DOCKET

No. 84-5108-CFY
Status: GRANTED

Title: Frank Liparota, Petitioner
v.
United States

Docketed:
July 23, 1984

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Huyck, William T.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 23 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Aug 21 1984		Order extending time to file response to petition until September 21, 1984.
5	Sep 21 1984		Order further extending time to file response to petition until October 8, 1984.
6	Oct 9 1984		Brief of respondent United States in opposition filed.
7	Oct 11 1984		DISTRIBUTED. October 26, 1984
9	Oct 29 1984		Petition GRANTED.
			**********
10	Nov 8 1984	G	Motion of petitioner for appointment of counsel filed.
11	Nov 13 1984		DISTRIBUTED. November 21, 1984. (Motion of petitioner for appointment of counsel).
12	Nov 26 1984		Motion for appointment of counsel GRANTED and it is ordered that William T. Huyck, Esquire, of Chicago, Illinois, is appointed to serve as counsel for the petitioner in this case.
13	Dec 5 1984		Joint appendix filed.
14	Dec 13 1984		Brief of petitioner Frank Liparota filed.
16	Jan 8 1985		Order extending time to file brief of respondent on the merits until February 4, 1985.
17	Feb 4 1985		Brief of respondent United States filed.
18	Feb 5 1985		SET FOR ARGUMENT. Tuesday, March 19, 1985. (3rd case).
19	Feb 11 1985		CIRCULATED.
20	Mar 13 1985	X	Reply brief of petitioner Frank Liparota filed.
21	Mar 6 1985	G	Motion of the Solicitor General to permit Charles Rothfeld to present oral argument pro hac vice filed.
22	Mar 18 1985		Motion of the Solicitor General to permit Charles Rothfeld to present oral argument pro hac vice GRANTED. Justice Powell OUT.
23	Mar 19 1985		ARGUED.

PETITION FOR WRIT OF CERTIORARI

RECEIVED
JUL 23 1984
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SUPREME COURT, U.S.

NO. 84-5108

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FRANK LIPAROTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether this Court should resolve a conflict between the decision of the Seventh Circuit Court of Appeals below, and decisions of the Eighth and Tenth Circuit Courts of Appeal on the question of whether one of the Federal food stamp criminal statutes, Title 7, U.S.C. §2024(b)(1) requires that the government prove that the defendant knew that his dealings in food stamps were not authorized by law.

NO. 84-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

FRANK LIPAROTA,	)
Petitioner,	)
v.	)
UNITED STATES OF AMERICA,	)
Respondent.	)

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 4, 1984.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. It is reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

This case involves Title 7, U.S.C. §2024(b)(1), which reads as follows:

> Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may

> also be fined not more than $10,000 or, if such coupons or authorization cards are of a value of less than $100, shall be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

STATEMENT OF THE CASE

Defendant and his brother, Charles LaPort, were named in a three-count indictment returned September 22, 1982. LaPort pled guilty prior to trial. The indictment charged three purchases of food stamps from an undercover agent: (1) $150 for $195 face value of stamps on March 27, 1982; (2) $350 for $500 face value of stamps on April 3, 1982; and (3) $300 for $500 face value of stamps on May 6, 1982.

Defendant was convicted after a jury trial and sentenced to "Three hours on counts 1, 2 and 3. Sentences considered served."

This was a case where the Department of Agriculture departed from its usual procedure of giving several warnings to a food store before sending in an undercover agent. Instead, acting on a "tip," they went into a small restaurant which was not even in the food stamp program and immediately began making undercover sales to the owners.

William Pryor, a supervisor with the Food and Nutrition Service ("FNS") of the United States Department of Agriculture, testified regarding the Government's food stamp enforcement program. Pryor explained that retail food stores are authorized by FNS to take food stamps only after an on-site inspection. (Tr. 6). At this initial visit, a form is used which sets forth the various things to be gone over with the owner. The various requirements of the food stamp program are covered at that time. (Tr. 13). When a store is accepted into the program, they receive a pamphlet containing the food stamp

regulations. (Tr. 14). Subsequent visits to the store by FNS officers are of two types: educational visits and compliance visits. The volume of redemptions is monitored, which may trigger a visit by an officer to the store. (Tr. 14). Visits by officers are often followed up by a letter to the store owner. (Tr. 15). In the compliance visits and followup letters, the requirements of the food stamp program are explained. (Tr. 15). Prior to referring a store to the compliance branch, Pryor's department initially attempts to correct the situation. (Tr. 16). The compliance branch conducts its own investigation, and then refers appropriate cases to the Inspector General for prosecution. (Tr. 16-17).

Defendant, his brother and father operated Moon's Sandwich Shop on West Roosevelt Road in Chicago for 46 years until it was closed in 1982. It was a small restaurant, seating 24 people at a counter and tables. In recent years, the neighborhood had become very bad. (Tr. 43, 135, 168-171). The restaurant was not a member of the food stamp program, and had never received literature or compliance visits, and defendant was not familiar with the food stamp regulations. (Tr. 111-112, 133-134, 176).

Agent Sherrye Hampton initiated her undercover investigation of Moon's based on a "tip" received during an investigation of a food store. (Tr. 132-133). There was no explanatory literature, and no compliance visit. Instead, Agent Hampton immediately began attempting to make undercover sales of food stamps. On the first two occasions, after speaking briefly to defendant at the food counter, she actually sold the stamps to the co-defendant, LaPort, in a back room. (Tr. 45-46, 92-96, 126).

On the second visit, when the defendants expressed some hesitation, the agent assured them the stamps were OK. (Tr. 94, 134).

Nearly a month elapsed between the two purchases made by co-defendant LaPort, and the third transaction, which was handled by defendant Liparota. In several meetings during that

period, it became apparent that defendant was, in fact, purchasing the stamps on behalf of someone else, who was furnishing the money. (Tr. 106-109, 113-115, 138-141, 174-176).

At sentencing, Judge Marshall commented on the evidence as follows:

> "...I want you to know that I feel badly about the fact that you have been prosecuted. I think it would have been quite enough in this case for somebody to have shown up in Mr. Liparota's restaurant one day, and taken him and his brother in the back room and said, 'Look you guys, we know you bought some food stamps. Now, cut it out.'
>
> And to crank up the machinery of Government and to impose it upon these two men in literally the twilight of their life, I just -- I just do not understand it."

(May 10, 1983 Tr. 3).

Although the statute on which the indictment is based, Title 7, U.S.C. §2024(b)(1), uses only the term "knowingly" in describing intent, the indictment charged that defendant "willfully and knowingly" acquired the stamps. Defendant, in his testimony, denied that he acted willfully, in that he was not familiar with the pertinent regulations making it illegal to acquire food stamps for cash. (Tr. 176).

The jury were not instructed on the meaning of the term "willfully." They were instructed that "knowingly" means that "defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident." (Tr. 250).

Defendant tendered a specific intent instruction taken from Devitt & Blackmar, Federal Jury Practice and Instructions, §14.03, which reads as follows:

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent, the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case. (Defendant's Instruction No. 2, R. 48).

The Court refused this instruction over objection, stating, "This is not a specific intent offense. It's contraband, and that's it. He knows that he's purchasing it." (Tr. 205). Further, the Court ruled that defense counsel could not argue ignorance of the law to the jury. (Tr. 215-216).

REASONS FOR GRANTING THE WRIT

The Seventh Circuit Court of Appeals expressly acknowledged in its opinion that its holding with regard to the intent required to prove a violation of Title 7 U.S.C. §2024(b)(1) directly conflicted with recent decisions by the Eighth and Tenth Circuits. (Slip. Op., p. 5). The Court further noted that it had, on its own motion, circulated the opinion to the entire Court on the question of whether the conflict with the two other Circuits required a rehearing en banc, and only one judge favored such a rehearing. (Slip. Op., p. 1).

The statute provides in pertinent part that "whoever knowingly...acquires...coupons...in any manner not authorized by this chapter..." is guilty of an offense. Petitioner contends that this statute requires the government to prove a defendant knew his acquisition of food stamps was in a manner not authorized by law. The instruction tendered by defendant and refused would have so instructed the jury.

Petitioner contends that the word "knowingly" in the statute modifies not only the verb "acquires," but also the phrase "in any manner not authorized by this chapter." This is precisely the reading of the statute adopted by the Eighth and Tenth Circuits. United States v. Marvin, 687 F.2d 1221 (8th Cir. 1982); United States v. O'Brien, 686 F.2d 850 (10th Cir. 1982).

A review of the three opinions reveals that the Marvin and O'Brien opinions are carefully reasoned, and that the Seventh Circuit's rejection of them does not effectively refute them.

The opinion of the Tenth Circuit Court of Appeals in O'Brien was rendered on August 23, 1982, the Court noting that

the issue was one of first impression. (686 F.2d at 852). The Court noted that the statute was ambiguous in that it could be read either with the word "knowingly" modifying merely the verb "acquire" as argued by the government, or with the word "knowingly" modifying both the verb "acquire" and the phrase "in any manner not authorized by this chapter" as contended by the defendant. (686 F.2d at 852). The Court then canvassed the legislative history and found no evidence regarding the intent of Congress. (686 F.2d at 852-853). The Court then resolved the issue in favor of the defendant on the basis of well-established priniciples concerning the construction of criminal statutes, namely that ambiguities should be resolved in favor of leniency, that statutes should be construed strictly against the government, and that criminal statutes are ordinarily interpreted as requiring criminal intent, particularly when they involve a felony. (686 F.2d at 853). The Court then further noted that its construction of the statute avoided the incongruous result of imposing criminal liability for a wider range of violations than that required for civil liabilty under Title 7 U.S.C. §2015(b)(1). (686 F.2d at 853).

The Tenth Circuit Court of Appeals reaffirmed its construction of this statute in United States v. Salazar, 720 F.2d 1482 (10th Cir. 1983), where it held that the requirement of proof of specific intent helped save the statute from a contention that it was unconstitutionally vague. (720 F.2d at 1484-1486).

The opinion of the Eighth Circuit Court of Appeals in Marvin was issued only eleven days after the decision of the Tenth Circuit in O'Brien, and does not mention that opinion, the Court noting, "Neither side has cited an appellate opinion directly in point, and we have found none." (687 F.2d at 1225).

The Eighth Circuit also found the statute to be ambiguous in that it could be read either way, although it favored the defendant's reading, stating,

> "...purely as a verbal matter, the word 'knowingly' in subsection (b) may naturally be read

> to modify the entire remainder of the clause in which it appears, including the phrase 'in any manner not authorized,' etc. To read 'knowingly' as having nothing to do with the phrase 'in any manner not authorized' is, we suppose, verbally tenable, but it is not the only meaning the words will bear, nor even, we think, the more natural one." (687 F.2d at 1226).

The Court reviewed the legislative history and found nothing supporting the government's reading, and one minor item supporting the defendant's reading (687 F.2d at 1227). The Court also relied upon the principle that felony statutes as a general rule require a showing of specific intent, concluding, "we should not attribute to Congress the intention to make a felony out of a morally innocent act, unless Congress has clearly announced its desire to do so." (687 F.2d at 1226).

Most pertinent for purposes of this Petition is the fact that the Eighth Circuit discussed and rejected the textual argument adopted by the Seventh Circuit, namely, that the placing of the word "knowingly" in a subsequent paragraph of the statute, §2024(c), shows that Congress "knew how to place the word" so as to require unambiguously a specific intent to violate the law. The Eighth Circuit characterized this argument as "too weak a reed to support the argument that Congress intended to displace a time-honored principle of criminal jurisprudence." (687 F.2d at 1226).

CONCLUSION

Petitioner respectfully submits that this Court should grant certiorari in order to resolve an important issue in prosecutions under a statute which is being vigorously enforced by the government. The facts in this case, as well as Marvin and O'Brien, reveal an intention by the government to enforce the statute by making undercover "sales" of food stamps to persons not subject to the regulatory system. Thus, the issue of whether such persons may be guilty despite their lack of intent to violate the law is a crucial and recurring one. The outcome of jury trials may depend upon whether juries are instructed to consider the defendant's assertions of lack of

knowledge of the law, and thus be different in the Seventh than in the Eighth and Tenth Circuits.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 83-1879

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK LIPAROTA,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 664—Prentice Marshall, *Judge*

ARGUED JANUARY 5, 1984—DECIDED JUNE 4, 1984*

Before ESCHBACH, POSNER, and COFFEY, *Circuit Judges.*

COFFEY, *Circuit Judge.* The defendant, Frank Liparota, appeals his conviction of three counts of acquiring and possessing food stamps in violation of 7 U.S.C. § 2024(b) (1977). We affirm.

* This opinion has been circulated among all judges of this court in regular active service. Only one judge favored a rehearing *en banc* on the question of whether this opinion creates a conflict with the Eighth and Tenth Circuit decisions in *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1768 (1983) and *United States v. O'Brien*, 686 F.2d 850 (10th Cir. 1982).

Liparota and his brother, Charles LaPort, owned a sandwich shop in Chicago, Illinois, known as Moon's. The restaurant had never been authorized to participate in the food stamp program.

At trial, Special Agent Sherrye Hampton of the United States Department of Agriculture testified that she received information in March of 1982 from one of the appellant's former employees that she might be able to sell food stamps at the restaurant. Based on this information, Hampton began her investigation with a visit to Moon's restaurant on March 27, 1982 (on each visit to the restaurant, Agent Hampton was equipped with a recording device). On that date, she approached a man behind the counter and asked to speak to Frank. The appellant responded that he was Frank (Liparota). Hampton informed Liparota that she had $195.00 worth of food stamps for sale. He asked her how much she wanted for them; she responded, "whatever is fair." In response, Liparota offered to pay $150.00 for the stamps. Hampton was then directed to a back room in the restaurant where LaPort gave her $150.00 in cash for the food stamps.

On April 3, 1982, Hampton returned to Moon's. She testified that Liparota approached her while she was seated at the lunch counter. She informed him that she had $500.00 worth of food stamps for sale and he again asked her how much she wanted for them whereupon she responded, "Well, whatever is fair, you tell me what you think." She testified that Liparota on this occasion offered her $350.00 for the stamps although she was actually paid only $300.00.

Hampton visited the restaurant again on May 5, 1982, with another $500.00 supply of food stamps. She testified that the defendant informed her that he had no money at that time to purchase the stamps, thus a meeting was arranged for the following day. On the next day, Hampton testified that she was paid $350.00 for $500.00 worth of food stamps. She also stated that Liparota offered to "hustle" food stamps for her in exchange for $50.00 worth of food stamps.

At trial, Liparota admitted setting the price for the food stamps purchased on March 27, 1982, denied taking part in the actual sale, and also denied participating in the other transactions, testifying that it was not his voice on the tapes. The tapes of each transaction were played several times for the jury.

The jury found Liparota guilty of all three counts of acquiring and possessing food stamps in a manner not authorized by 7 U.S.C. § 2024(b) (1977). A sentence of three hours in prison was imposed and suspended. The defendant appeals.

The appellant argues that the trial court limited the government to proving a violation of 7 C.F.R. § 278.2(a) (1978).[1] He maintains that this provision is inapplicable in his case because he did not operate a retail food store. He contends that the inapplicability of the regulation, coupled with the trial court's limiting instruction, requires reversal of his conviction. We disagree.

From our examination of the record we are unable to ascertain which of the trial court's rulings the defendant questions in his claim that the trial court limited the government solely to a prosecution under 7 C.F.R. § 278.2(a) (1978). The government specified 7 U.S.C. § 2024(b) in both the indictment and its response to Liparota's Motion for Bill of Particulars as the section Liparota had allegedly violated. While the response to the defendant's motion also included a reference to 7 C.F.R. § 278.2(a) (1978), it is clear that the government was required only to prove a violation of 7 U.S.C. § 2024(b) (1977) in order

[1] "Sec. 278.2 Participation of retail food stores.

"(a) Use of coupons. Coupons shall be accepted by an authorized retail food store only in exchange for eligible food. Coupons may not be accepted in exchange for cash, except when cash is returned as change in a transaction in which coupons were accepted in payment for eligible food, under paragraph (d) of this section. Coupons may not be accepted in payment of interest on loans, or for any other nonfood use."

to obtain a conviction. Therefore, we need not determine whether the provisions of 7 C.F.R. § 278.2(a) (1978) are applicable to persons or groups other than retail food stores.

Section 2024(b) states in relevant part that:

> "[W]hoever knowingly, uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony. . . ."

7 U.S.C. § 2024(b) (1977). Thus, acquisition and possession of food stamps violates 7 U.S.C. § 2024(b) unless there is an affirmative authorization for such acquisition or possession.

The language of section 2024(b) is broadly stated. It clearly prohibits any form of dealing in food stamps, whether by a participant or non-participant in the food stamp program, unless there has been some specific authorization for a person or organization to trade in food stamps in a specified manner under 7 U.S.C. § 2011 *et seq.* Thus, a person violates section 2024(b) by using, trading, transferring, acquiring, purchasing or selling food stamps absent specific authorization to do so.

There is no authorization anywhere in the Code or regulations for anyone to purchase food stamps. Indeed, as this court stated in *United States v. Wilson*, 438 F.2d 479 (7th Cir.), *cert. denied*, 402 U.S. 929 (1971), the "provisions are apparently designed to prevent trafficking in such coupons." *Id.* at 481. While the provisions at issue in that case involved purchase of food stamps by a participant in the food stamp program, the broad language of section 2024(b) clearly does not limit the congressional prohibition to participants in the program. Rather, it forbids any person to purchase food stamps.

In light of the broad language of section 2024(b), the trial court limited the prosecution to proof that Liparota

violated the statute by *purchasing* the stamps.[3] We believe the prosecution did this to the satisfaction of the jury and we decline to overrule the jury verdict on these grounds.

The appellant's second argument is that the trial court erred in failing to instruct the jury on the meaning of "willfully" because the indictment charged him with knowingly and willfully purchasing the food stamps contrary to 7 U.S.C. § 2024(b) (1977). We find this contention to be without merit as § 2024(b) clearly states that only a finding of general intent is necessary to sustain a conviction.

We are aware that other circuits have held that a specific intent instruction must be given in a prosecution under 7 U.S.C. § 2024(b). *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1768 (1983); *United States v. O'Brien*, 686 F.2d 850 (10th Cir. 1982). Both courts held that the adverb "knowingly" as used in section 2024(b) modifies the verbs "uses, transfers, acquires . . ." and the phrase "in any manner not authorized . . . ." *Marvin*, 687 F.2d at 1226; *O'Brien*, 686 F.2d at 853. Therefore, both courts found that section 2024(b) requires a finding of specific intent. We respectfully dis-

[3] The trial court stated:

> "I think there is a more serious question, and that is whether under the bill of particulars the Government should be permitted to argue alternatively that Mr. Liparota committed an offense because he received food stamps under any circumstances, not being a certified participant in the program. . . .
>
> "The statute says that unless you are authorized to receive food stamps, thou shalt not receive them. . . . He's not authorized to receive them. So if he hadn't paid a dime for them, one can argue that he would violate 2024(b).
>
> "That, however, is not the charge that the Government has brought against him in light of the bill of particulars. . . . I am going to confine the Government in its theory of the case to the proposition that Mr. Liparota violated the statute when he purchased the stamps for cash."

Trans. 165-66.

agree and hold that section 2024(b) only requires proof that a defendant knowingly used, transferred, acquired or possessed food stamps or authorization cards and that such use, transfer, etc. was unauthorized.

The Tenth Circuit noted, "7 U.S.C. section 2024(b) is simply not clear on its face, and, on the contrary, is ambiguous. The statute can be read either way." *O'Brien*, 686 F.2d at 852. The court stated that section 2024(b) can be read so that:

> "the adverb 'knowingly' modifies only the verb 'acquire,' and does not modify the ensuing clause 'in a manner not authorized by this chapter or the regulations issued pursuant to this chapter . . . . [or] that the word 'knowingly' modifies not only the verb 'acquire,' but also the ensuing clause."

Id. at 851-52. However, a comparison of the placement of the word "knowing" in 7 U.S.C. § 2024(c) (1977)[3] to the placement of the word "knowingly" in section 2024(b) is evidence that Congress "knew how to place the word . . . in such a way as to require unambiguously that a person know he is acting contrary to law." *Marvin*, 687 F.2d at 1226. In view of the fact that Congress knew precisely how to create a specific intent offense, and did so in the provision immediately following the section at issue here, we find that section 2024(b) cannot be characterized as ambiguous. It must be held that Congress intended to require only proof of general intent.

With respect to the defendant's argument that the inclusion of the word "willfully" in the indictment required the government to prove specific intent, this court has held that allegations in an indictment not essential to

[3] 7 U.S.C. section 2024(c) (1977) provides in relevant part:

> "Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter shall be guilty of a felony. . . ."

prove the crime charged are mere surplusage. *United States v. Green*, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). Such allegations need not be proved nor embodied in instructions to the jury. *United States v. Harper*, 579 F.2d 1235 (10th Cir.), *cert. denied*, 439 U.S. 968 (1978); *Milentz v. United States*, 446 F.2d 111 (8th Cir. 1971).

Additionally, this court has specifically disapproved of boiler plate specific intent instructions where the trial court "adequately instructs on the requisite mental state by other means." *United States v. Arambasick*, 597 F.2d 609, 613 (7th Cir. 1979). Indeed, in *Arambasick*, this court disapproved of the very instruction tendered by the appellant. *Id.* at 610-11; *see* 1 E. Devitt & C. Blackman, Federal Jury Practice and Instructions, section 14.03 (3d ed. 1977).

The trial court appropriately instructed the jury on general intent and was equally correct in refusing to give the tendered specific intent instruction to the jury. Specific intent is not required for a conviction under 7 U.S.C. § 2024(b) (1977) and we hold an instruction on specific intent could very well have confused rather than enlightened the jury on the element of intent.

The appellant's final argument is that the trial court erred in failing to instruct the jury on entrapment. It is well-settled law in this circuit that a defendant must admit to the commission of the offenses for which he is tried in order to properly raise an entrapment defense.[4] In *United States v. Kaiser*, 138 F.2d 219 (7th Cir. 1943), the defendant was found guilty of selling morphine. This court stated "[i]t is difficult to conceive of a competent attorney arguing to a court and jury that the defendant did not

[4] Other circuits have held that a defendant need not admit the acts of the alleged crime in order to raise an entrapment defense. *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (*en banc*); *United States v. Harrell*, 436 F.2d 606 (5th Cir. 1970), *cert. denied*, 409 U.S. 846 (1972); *Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962).

make the alleged sales, but, if so, he was entrapped." *Id.* at 220. In *United States v. Roviaro*, 379 F.2d 911 (7th Cir. 1967), we refused to overturn the defendant's conviction for selling heroin, stating ". . . defendant admitted no criminal acts. In such a situation, it has been held that a defendant may not use the entrapment defense." *Id.* at 914 (citations omitted). In *United States v. Johnston*, 426 F.2d 112 (7th Cir. 1970), this court reiterated its previous holdings that "absent admission of the act an instruction on entrapment will not be submitted to the jury." *Id.* at 114.

Finally, in *United States v. Nicosia*, 638 F.2d 970 (7th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), this court refused to overrule *Johnston* because "the evidentiary record on appeal is devoid of any evidence in support of a defense of entrapment calling for an appropriate jury entrapment defense instruction." *Id.* at 973. Thus, it is clear in this circuit that a defendant must admit the alleged acts which constitute the crime with which he is charged in order to raise an entrapment defense.

Here, the appellant denied any participation in the transactions that occurred on April 3 or May 6, 1982. With respect to the transaction of March 27, 1982, Liparota admitted only to the discussion concerning the price of the stamps with Hampton and the introduction of Hampton to his brother, who in turn purchased the stamps. We hold the record fails to disclose any evidentiary foundation for the presentation of entrapment instructions to the jury and thus we hold the trial court did not err in refusing to instruct the jury on this issue.

The jury verdicts are AFFIRMED.

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Opinion by Judge Coffey

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

10

June 4, 1984.

Before

Hon. JESSE E. ESCHBACH, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 83-1879 vs.

FRANK LIPAROTA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 664
Judge Prentice Marshall

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this date.

OPPOSITION BRIEF

ORIGINAL

No. 84-5108

Supreme Court, U.S.
FILED
OCT 9 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

FRANK LIPAROTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether in a prosecution under 7 U.S.C. 2024(b) the government must prove that the defendant knew that his actions were not authorized by law.

IN THE SUPREME COURT OF THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 735 F.2d 1044.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9) was entered on June 4, 1984. The petition for a writ of certiorari was filed on July 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of three counts of acquiring food stamps in a manner not authorized by law, in violation of 7 U.S.C. 2024(b) (Pet. App. 1). He was sentenced to three hours' imprisonment, the sentence to be considered served (Pet. App. 3).

1. The evidence at trial showed that petitioner and his brother owned a restaurant that was not authorized to participate in the food stamp program (Pet. App. 2). In March 1982 an agent of the Department of Agriculture received a tip that she might be able to sell food stamps at the restaurant (Pet. App. 2). She therefore visited the restaurant and approached petitioner,

offering to sell him $195 worth of food stamps. Petitioner agreed to puchase the stamps for $150, and petitioner's brother paid her that sum in exchange for the stamps. The agent made similar sales of stamps valued at several hundred dollars to petitioner and his brother on two subsequent occasions (Pet App. 2).

Petitioner was indicted on three counts of violating Section 2024(b). When the case was submitted the trial judge instructed the jury that "[w]hen the word 'knowingly' is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident" (R. 49(15)). The judge then charged that the government bore the burden of proving that "the defendant knowingly and willfully acquired food stamps" (R. 49(19)). But the judge rejected petitioner's request that he give an instruction on specific intent, thus declining to charge the jury that petitioner could be convicted only if he knowingly violated the law.

2. On appeal, petitioner contended, among other things, 1/ that the district court erred in failing to instruct the jury on specific intent. The court of appeals disagreed, ruling that "§ 2024(b) clearly states that only a finding of general intent is necessary to sustain a conviction" (Pet. App. 5).

1/ The court of appeals rejected petitioner's arguments that the government's proof did not match the allegations set out in its bill of particulars (Pet. App. 3-5) and that the district court erred in refusing to give an entrapment instruction because petitioner did not admit the commission of the offenses for which he was tried (Pet. App. 7-8).

The court arrived at its holding by comparing the placement of the word "knowingly" in Section 2024(b) 2/ with the placement of the word "knowing" in Section 2024(c). 3/ In the latter provision, the court of appeals noted, "knowing" precedes and therefore plainly modifies the requirement that the stamps be used "in violation of" law. In Section 2024(b), in contrast, "knowingly" precedes the verbs "uses, transfers, acquires, alters or possesses." The court of appeals reasoned that, given this difference between the provisions, Congress must not have intended that the word "knowingly" in Section 2024(b) apply to the requirement that the stamps be transferred or acquired in a "manner not authorized by this chapter." The court therefore concluded that, "[i]n view of the fact that Congress knew precisely how to create a specific intent offense, and did so in the provision immediately following the section at issue here * * * section 2024(b) cannot be characterized as ambiguous. It must be held that Congress intended to require only proof of general intent" (Pet. App. 6).

In reaching its conclusion the court of appeals noted that both the Eighth and the Tenth Circuits have held that "section 2024(b) requires a finding of specific intent" (Pet. App. 5). United States v. Marvin, 687 F.2d 1221 (8th Cir. 1982), cert. denied, No. 82-990 (1983); United States v. O'Brien, 686 F.2d

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2/ Section 2024(b) states in relevant part: "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter * * * shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony * * * ."

3/ Section 2024(c) provides in relevant part: "[w]hoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter * * * shall be guilty of a felony * * * ."

850 (10th Cir. 1982). 4/ But the court below, pointing to the structure of Section 2024(c), "respectfully disagree[d]" with the holdings of Marvin and O'Brien (Pet. App. 5-6). 5/

DISCUSSION

1. We believe that the decision of the court below is correct. The Eighth and Tenth Circuits both concluded that neither the language nor the legislative history of Section 2024(b) is dispositive on the question whether the provision makes use of a general rather than a specific intent standard. See Pet. App. 6; Marvin, 687 F.2d at 1226-1227; O'Brien, 686 F.2d at 852-853. 6/ In reaching their conclusion those circuits therefore applied canons of construction -- in particular, the rule of lenity (O'Brien, 686 F.2d at 852-853) and the presumption that, in the absence of a congressional directive to the contrary, conviction of a crime requires a finding of specific intent (Marvin, 687 F.2d at 1226-1228).

As the Seventh Circuit explained, however, the use of these canons is inappropriate in this case because here there are clear indications of congressional intent. In Section 2024(b)'s companion provision, Section 2024(c), Congress plainly used the term "knowing" to condition the statutory requirement that the stamps have been received or used in violation of law. In

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4/ Petitioner did not argue before the court of appeals that Section 2024(b) is a specific intent crime; he instead contended that the trial judge should have given a specific intent instruction because the indictment alleged that petitioner had acted "willfully" (Pet. App. 5). The court of appeals rejected this contention (Pet. App. 6-7). It was the government that brought Marvin and O'Brien to the attention of the court below, leading to the court's analysis of Section 2024(b).

5/ The opinion below was circulated to the full Seventh Circuit; only one judge favored rehearing en banc to resolve the apparent conflict with the decisions of the Eighth and Tenth Circuits (Pet. App. 1 n.*).

6/ The Eighth Circuit in Marvin did point to post-enactment legislative history as supporting its conclusion (687 F.2d at 1227).

Section 2024(b), the word "knowingly" does not directly modify the statutory requirement that the stamps have been received or used in violation of law. Cf. United States v. Yermian, No. 83-346 (June 27, 1984), slip op. 5-6.

This distinction is a sensible one. Unless specific intent is required for conviction under Section 2024(c), that provision might be read to make a grocer strictly liable for the fraud of his customer, or a food stamp recipient strictly liable for the fraud of the issuer. In contrast, there was no need to make Section 2024(b) a specific intent crime because only a wrongdoer himself can perform the acts at which the provision is directed -- that is, using, transferring, acquiring, possessing, or altering food stamps in an unauthorized manner.

2. While we support the conclusion of the court below, we nevertheless do not oppose a grant of certiorari in this case. As the Seventh Circuit noted (Pet. App. 5-6), its decision cannot be reconciled with the holdings of the Eighth and Tenth Circuits. 7/ Those courts require a jury charge to the effect that "knowledge that one's acquisition of food stamp coupons is in a manner not authorized by statute or regulation is an essential element of 7 U.S.C. § 2024(b)" (O'Brien, 686 F.2d at 852; see Marvin, 687 F.2d at 1225). In this case, the court of appeals ruled that the district court properly declined to give such an instruction.

This conflict involves a central element of a significant and often invoked criminal statute. 8/ In light of the number of

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7/ The Sixth Circuit recently adopted the views of the Eighth and Tenth Circuits. United States v. Pollard, 724 F.2d 1438, 1438-1439 (6th Cir. 1984). The Eighth and Tenth Circuits have shown no inclination to retreat from their holdings in Marvin and O'Brien. See United States v. Paltico, 687 F.2d 273, 275 (8th Cir. 1982); United States v. Salazar, 720 F.2d 1482, 1485 (10th Cir. 1983).

8/ Section 2024(b) is the principal statutory provision used to combat the fraudulent use of food stamps; we have been informed (Continued)

Circuits that have now addressed the nature of Section 2024(b)'s intent requirement, 9/ it would be appropriate for this Court to resolve the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

OCTOBER 1984

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that 746 indictments were returned charging violations of the provision last year.

9/ One factor militating against review is petitioner's failure to argue to the court of appeals that Section 2024(b) reaches only knowing violations of the law. See n. 4, supra. The court nevertheless addressed the issue and plainly held that only general intent must be established under the statute (Pet. App. 6). The opinion then was circulated to the full court of appeals, which declined to order a rehearing en banc to resolve the apparent conflict among the Circuits. Further, at trial petitioner did ask the district court to give a specific intent instruction; the court refused over petitioner's objection, explaining that "[t]his is not a specific intent offense" (Tr. 205). The issue therefore was preserved and fully considered below.

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JOINT

APPENDIX

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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No. 84-5108 (b)

In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANK LIPAROTA, PETITIONER

v.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED JULY 23, 1984
CERTIORARI GRANTED OCTOBER 29, 1984

49 pp

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DOCKET ENTRIES

Date	Number	Proceedings
09-22-82	1	Filed indictment
04-04-83	44	Voir dire begins (Counts 1, 2, 3) (Judge Marshall)
04-04-83	44	Jury impaneled (Counts 1, 2, 3) (Judge Marshall)
04-04-83	44	Trial begins—jury (Counts 1, 2, 3) (Judge Marshall)
04-04-83	44	Trial held—jury (Counts 1, 2, 3) (Judge Marshall)
04-04-83	44	Jury trial adjourned to 04/05/83 at 10:30 a.m. (Counts 1, 2, 3) (Judge Marshall)
04-05-83	46	Trial held—jury (Counts 1, 2, 3) (Judge Marshall)
04-05-83	46	Jury trial adjourned to 04/06/83 at 9:30 a.m. (Counts 1, 2, 3) (Judge Marshall)
04-06-83	47	Trial held—jury (Counts 1, 2, 3) (Judge Marshall)
04-06-83	47	Trial ends—jury (Counts 1, 2, 3) (Judge Marshall)
04-06-83	47	Jury verdict of guilty (Counts 1-3) (Judge Marshall)
04-06-83	48	Filed working drafts of instructions
04-06-83	49	Filed jury instructions (given)
05-10-83	56	Sentencing of defendant (Counts 1-3) (The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) HOURS on counts 1, 2, & 3. Sentence considered served) (Judge Marshall)
05-12-83	57	Filed notice of appeal (Counts 1-3)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 CR 664

UNITED STATES OF AMERICA

v.

FRANK LIPAROTA and CHARLES LAPORT

Violation: Title 7, United States Code, Sec. 2024 (b)

INDICTMENT

The SPECIAL APRIL 1980 GRAND JURY charges:

On or about March 27, 1982, in the Northern District of Illinois, Eastern Division,

FRANK LIPAROTA and
CHARLES LAPORT,

defendants herein, did willfully and knowingly acquire and possess United States Department of Agriculture Food Stamp Coupons having a value of more than $100 in a manner not authorized by Title 7, United States Code, Chapter 51 and the regulations issued pursuant thereto (Title 7, Code of Federal Regulations, Section 271 *et seq.*) in that FRANK LIPAROTA and CHARLES

LAPORT unlawfully and knowingly purchased approximately $195 (face value) worth of Food Stamp Coupons in return for $150 in cash;

In violation of Title 7, United States Code, Section 2024(b).

COUNT TWO

The SPECIAL APRIL 1980 GRAND JURY further charges:

On or about April 3, 1982, in the Northern District of Illinois, Eastern Division,

FRANK LIPAROTA and
CHARLES LAPORT,

defendants herein, did wilfully and knowingly acquire and possess United States Department of Agriculture Food Stamp Coupons having a value of more than $100 in a manner not authorized by Title 7, United States Code, Chapter 51 and the regulations issued pursuant thereto (Title 7, Code of Regulations, Section 271 *et seq.*) in that FRANK LIPAROTA and CHARLES LAPORT unlawfully and knowingly purchased approximately $500 (face value) worth of Food Stamp Coupons in return for $350 in cash;

In violation of Title 7, United States Code, Section 2024(b).

COUNT THREE

The SPECIAL APRIL 1980 GRAND JURY further charges:

On or about May 6, 1982, in the Northern District of Illinois, Eastern Division,

FRANK LIPAROTA,

defendant herein, did wilfully and knowingly acquire and possess United States Department of Agriculture Food

Stamp Coupons having a value of more than $100 in a manner not authorized by Title 7, United States Code, Chapter 51 and the regulations issued pursuant thereto (Title 7, Code of Federal Regulations, Section 271 *et seq.*) in that FRANK LIPAROTA unlawfully and knowingly purchased approximately $500 (face value) worth of Food Stamp Coupons in return for $300 in cash;

In violation of Title 7, United States Code, Section 2024(b).

A TRUE BILL:

_____

Foreperson

_____

United States Attorney

TRANSCRIPT OF TESTIMONY

William Pryor

(Tr. 1) Transcript of Proceedings had in the above-entitled cause before the HONORABLE PRENTICE H. MARSHALL, one of the Judges of said Court, 219 South Dearborn Street, Chicago, Illinois 60604, on April 4, 1983, at the hour of 2:00 o'clock p.m.

• • • •

(Tr. 2)

WILLIAM PRYOR, called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

THE COURT: Be seated, please. Now, keep your voice up so that the last two jurors can hear all of your testimony.

DIRECT EXAMINATION

BY MS. DE MAIO:

Q: Sir, will you please state your name and spell your last name for the court reporter?

A: William Pryor, P-R-Y-O-R.

Q: And Mr. Pryor, by whom are you employed?

A: U.S. Department of Agriculture, Food and Nutrition Service.

Q: Mr. Pryor, what is the Food and Nutrition Service?

A: We are the monitoring agency for all food programs sponsored by the U.S. Government.

Q: Where do you work, what city?

A: Chicago.

Q: Do you have an area that's within your responsibility?

(Tr. 3)

A: Yes.

Q: What is that area?

A: I cover Cook County, the seven counties immediately adjoining Cook County, and two counties in Indiana.

Q: How long have you been with the Food Nutrition Service?

A: 13 years.

Q: What is your present position with them?

A: I'm officer in charge of field operations.

Q: How long have you been the officer in charge of field operations?

A: Since 1977.

• • • •

(Tr. 11)

Q: Have you checked those records to determine whether Moon's Restaurant or Sandwich Shop in Chicago was ever authorized to participate in the Food Stamp Program?

A: Yes, I did.

Q: And what did your check of the records—

A: We found no application and no authorization.

Q: They have never applied?

A: No.

• • • •

CROSS EXAMINATION

BY MR. HUYCK:

Q: So if Moon's Restaurant—by the way, Moon's (Tr. 12) Restaurant which, I will tell you, is a small sandwich shop that seats about 24 people on West Roosevelt Road—that wouldn't be the sort of place that would be a member of the Food Stamp Program, isn't that correct?

A: It could be, sir. If they would contract with the State to feed the elderly at a reduced price, it's possible for them to be authorized.

Q: Are there a lot of restaurants in Chicago that are members?

A: No, sir.

Q: No. Now, since they are not members, they cannot take food stamps to their bank and cash—and get full credit for them, can they?

A: No, sir.

Q: And since they are not a restaurant, they are not part of your Food and Nutrition Service compliance program, is that correct?

A: How are you saying that, sir?

Q: They would not be visited by officers from the Food and Nutrition Service?

A: No, sir.

Q: No. Now, I want to briefly review with you what your procedures are as far as your contacts with the retailers that do want to sign up for food stamps. You say—when they send in an application, then somebody from your service goes out to the (Tr. 13) store, is that correct?

A: Yes, sir.

Q: And there is a regular form that they fill out, isn't there?

A: Yes, sir.

Q: I'm showing you what I've marked as Defendant's Exhibit Number 1. This is a form having to do with some store that doesn't have anything to do with this case. But is that the kind of form that the officer uses called an initial contact report?

A: Yes, sir.

Q: This pretty well sets forth the different items that are gone over with the store who has applied for the program, is that correct?

A: Yes, sir.

Q: And the second half of this form has sort of a check list of points to be thoroughly explained to owner and manager, is that correct?

A: Yes, sir.

Q: And then it goes through the various requirements of the Food Stamp Program, is that correct?

A: Yes, sir.

Q: Does this officer, when he goes out to the store, also leave a copy of the food stamp regulations with the owner of the store?

(Tr. 14)

A: No, sir.

Q: Are those furnished to someone when they are accepted into the program?

A: Yes, sir.

Q: There is a regular pamphlet of the actual food stamp regulations, is that correct, that's furnished to the stores?

A: Yes, sir.

Q: Can I see Exhibit 6.

I'm showing you what's been marked as Government's Exhibit 6. Is that the booklet of food stamp regulations that is sent to stores?

A: Yes, sir.

Q: Now, the Food and Nutrition Service then monitors these stores after they are accepted into the program to see if they are cheating, isn't that right?

A: Yes, sir.

Q: For instance, one of the things you do is keep track of their redemption certificates to see how many food stamps a given store is redeeming, is that correct?

A: Right.

Q: And sometimes that might trigger another visit by an officer to the store?

A: Yes, sir.

Q: And you have two different kinds of visits, isn't that correct—educational visits and compliance visits?

(Tr. 15)

A: Yes, sir.

Q: And you actually have a large staff of these officers that do this, is this correct?

A: No, sir.

Q: How many officers are there that do this?

A: Six.

Q: All right. And then, when the officers have visited a store, then you frequently follow up their visit with a letter to the store owner, is that correct?

A: Yes, sir.

Q: And on these follow up compliance visits and in your follow up letters, you also explain to the store owner the requirements of the Food Stamp Program, is that correct?

A: Yes, sir.

Q: Then there is another part of the Agriculture Department called the office of the Inspector General, is that correct?

A: Yes, sir.

Q: And do you then—does the Food and Nutrition Service make referrals of cases to the Office of the Inspector General?

A: No, sir. That would not be in the normal course of our chain of command.

Q: Pardon me?

A: That would not be in the normal course of our chain (Tr. 16) of command.

Q: Well, how does the office of the Inspector General get the cases that they are to investigate?

A: Usually they would go through the compliance branch.

Q: The compliance branch. And how do they get to the compliance branch?

A: They come from our office.

Q: Okay. So, in other words, the first thing that happens is there is a store that you think is cheating on the Food Stamp Program, right?

A: Right.

Q: And prior to that being referred to the compliance branch, does the Food and Nutrition Service itself initially attempt to correct the situation?

A: Yes, sir.

Q: You first go to the store where the with a follow up visit, warning letter and things like that?

A: Right.

Q: And then it's only if there still seems to be something wrong going on at the store, you then send it onto the compliance branch, is that correct?

A: Right, sir.

Q: Do they then select the cases to be sent to the office of the Inspector General?

A: They will do the initial investigation. If they get (Tr. 17) a positive, then they will refer it onto the Office of Investigation.

Q: And the Office of Investigation, that's in the Office of Inspector General, is that correct? Now, Ms. Sherrye Hampton, who is the agent in this case, she's an agent in this office of Inspector General, is that correct?

A: Yes.

• • • •

(Tr. 17)

Q: You didn't have any investigation in your agency of Moon's sandwich shop, though, is that correct?

A: None.

• • • •

Sherrye Hampton

(Tr. 30)

Sherrye Hampton, called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

THE COURT: Be seated, please. Keep your voice up now so that the last two jurors can hear all of your testimony.

DIRECT EXAMINATION

BY MS. FEHST:

Q: Would you state your name and spell your last name for the record, please?

A: Sherrye Tonette Hampton, H-a-m-p-t-o-n.

Q: Are you employed?

A: Yes.

Q: With whom?

A: United States Department of Agriculture, Office of the Inspector General.

Q: How long have you been employed with them?

A: Approximately three and a half years.

Q: And what is your title with the United States Department of Agriculture, Office of Inspector General?

(Tr. 31)

A: Special Agent.

Q: And what are your duties?

A: My duties are to investigate and report Food Stamp Program violations, school lunch and child feeding program violations, rural loan housing frauds, meeting poultry inspection violations and bribery of agricultural officials.

Q: And in the course of your duties as special agent did you participate in the investigation of food stamps at Moon's Sandwich Shop on March 27, 1982?

A: Yes, I did.

• • • •

(Tr. 33)

Q: Agent, directing your attention to the stamps that you previously described, did you take those stamps with you on that day, March 27 of 82?

A: Yes, I had the stamps with me.

Q: And how many books did you bring with you that day?

• • • •

A: I had approximately three 65-dollar food stamp coupon books valued at $195.

• • • •

(Tr. 43)

Q: Did there come a time when you arrived at Moon's Sandwich Shop?

A: Yes, I did arrive at Moon's Sandwich Shop.

Q: What did you do when you got there?

A: When I got there, I secured the Nagra recording device on my person. I stuck it down on the side of my pants where I then exited the car and put my introduction on the tape and proceeded into Moon's Sandwich Shop.

Q: And where was Agent Wright?

A: She remained in the car.

Q: What did you do when you got to Moon's Sandwich Shop?

A: When I got to Moon's Sandwich Shop, I went into the sandwich shop and I approached the gentleman who was standing behind the counter—

Q: Before you go further, I would like to ask you if you can describe the interior of Moon's Sandwich Shop. Can you tell the members of the jury what it looked like on the inside?

A: Okay, Moon's Sandwich Shop is a—I'd say a small sandwich shop. It has a counter, a long counter in the front, (Tr. 14) and about four, five tables outside surrounded by chairs for people who want to sit and eat.

Behind the counter is where they prepare the food. There is a stove back there, and frying—places to fry food, things like that. But basically it's a small sandwich shop with a counter and chairs for seating.

Q: And is the kitchen a separate area?

A: Well, where they prepare the food is right out front but they do have two small back rooms on both sides, one on the right side and one on the left side. I would suppose that these rooms are—for storing supplies and doing dishes and things like that.

• • • •

(Tr. 46)

Q: And can you relate to the members of the jury what you said and what he said?

A: Fine. Like I said, I entered Moon's Restaurant, I approached the gentleman who was standing behind the

counter and I asked to speak to Frank. He said, "I'm Frank." I said, "I got some food stamps." He said, "How much?" I said, "I have $195 worth of food stamps."

So he said, "How much you want for them?" I said, "Well, whatever is fair." He asked me again, "How much you want for them?" I said, "Well whatever is fair, you know, whatever you think is right."

So he contemplated for a moment and he said, "How about $150." And I said, fine, "Okay, that will work."

Q: What happened after you agreed on a price?

A: After we agreed on a price, I set there for a moment. He walked away and started talking to another gentleman, a white gentleman who I know as Charley, and moments later he came down to me, and said, "Come on, let's go in the back. Come back here."

So I then went behind the counter and went to a back room which appeared to me to be a storage area. There was a (Tr. 47) sink and other goods back there stored. And I handed him my food stamps and he examined them to make sure that they were all there in complete books. He then started counting out money to me.

Q: Now, who counted out the money?

A: Charley counted out the money.

Q: All right.

A: At that time, it was just Charley and I in the back room. Frank had gone back out to finish working the counter. So Charley started counting out the money to me, and he counted out $140 to me and I said, "Hey, I thought he was going to give me $150."

He said, "$150, oh"—he walked out, I stayed in the back room. I presume he was talking—had a conversation with Frank. He came back and proceeded to count out the rest of the money to me. He counted out $150 in cash to me, handed it to me, and we had a small talk about when could I come back and things like this, and I departed the store—the restaurant.

Q: Now, the individual you had the conversation with, the man you identified as Frank, did there come a time when you learned his last name?

A: Yes, after the investigation was completed, I then learned his last name was Liparota but, at that point, I thought his name was Frank La Port.

• • • •

(Tr. 48)

Q: Did there come a time when you learned the last name of the individual identified to you as Charley?

A: Yes, but at the end of our investigation, I learned that his name was Charles La Port.

Q: And did there come a time, too, when you learned the relationship between the two?

A: Yes, I later found that they were in fact co-owners of the restaurant and brothers.

Q: Now, was this March 27, 1982 transaction recorded on the tape that you were wearing?

A: Yes, it was.

• • • •

(Tr. 88)

Q: Now, agent, did you continue your investigation of food stamps at Moon's Sandwich Shop on April 3rd, 1982?

A: Yes, I did.

• • • •

(Tr. 89)

Q: Now, did you bring stamps with you in your undercover capacity on April 3rd?

A: Yes, on April 3rd, I had ten fifty-dollar coupon food stamp books valued at five hundred dollars.

• • • •

(Tr. 91)

Q: Did there come a time when you actually arrived at Moon's Sandwich Shop?

A: Yes.

• • • •

(Tr. 92)

Q: And when you got inside Moon's Sandwich Shop, can you describe to the members of the jury how many people were present on that day, how many approximately were customers and how many people were employees?

A: There were approximately four employees, and I would say approximately five to eight customers in the sandwich shop.

Q: All right. Can you tell us what you did as you entered?

A: As I entered Moon's Sandwich Shop that day, I walked in, I set at the far left end of the counter. I sat on a stool where I was—a few moments later I was approached by Frank. I told him that I had food stamps, you know—

Q: At this time, did you—was there anyone else a party to the conversation?

A: No, just Frank and I.

Q: All right. And this conversation took place at—where in the restaurant?

A: This conversation took place in the front of the (Tr. 93) restaurant.

Q: Did your entire conversation with Frank take place—can you describe for the members of the jury during the course of your conversation with Frank, the Defendant, where you were during the course of that conversation?

A: My conversation with Frank—when I first started in the front of the restaurant, I was seated at the counter. And as our conversation progressed and we began to talk more about the food stamps, we moved into the back room as on the previous transaction. The back room was directly in front of me.

Q: Now, at whose suggestion did you move to the back room?

A: At Frank's suggestion.

Q: And how did he indicate to you that he wanted to move to the back room?

A: He motioned me. He physically motioned me with his head, you know, as he was walking down the counter. He motioned his head to me like this, and I got up, walked around the counter and we went to the back room.

Q: All right. Now, at some point in the conversation, did the defendant's brother Charley join in?

A: Yes, he did.

Q: And where were you—where were you in the restaurant at the time that—

(Tr. 94)

A: We went in the back room.

Q: And can you relate the conversation. What did you say and what did Frank say during the course of your conversation with him on that day?

A: Okay. Going back to the beginning, when I first entered the sandwich shop, I set down. Frank came over to me. I told him I had some stamps. He said how much. I told him I had five hundred dollars in stamps. He said, "How much you want for them?" I said, "Well, whatever is fair, you tell me what you think."

So he thought momentarily. He said, "How about three fifty." I said, "Okay." So I then told him, I say, "You know, the stamps aren't stolen or anything. My stamps are good." He say, "Well, you know, good things don't last forever. I hope you know, it lasts but good things don't last forever."

So he say, "You got a few minutes to wait?" I said, "Wait for what?" He said, "I want to take these stamps down and get them checked on the list." I said, "I'm not going to give my stamps up. You know, they are good stamps. If you can get the list and bring the list down here to have them checked, you know, I will be glad to let you check them, but I can't let you, you know, take my stamps, you know. They are good."

So he contemplated for a moment, and then came back to me, and that's when he told me he would give me $350 for (Tr. 95) the stamps. I said okay, fine—

Q: Agent, may I interrupt at this point and ask you what list was he—what list was the Defendant referring to?

A: He was referring to a list that is furnished by the Food and Nutrition Service, which is an agency of the Department of Agriculture, which regulates the Food Stamp Program.

This list is sent out to all authorized retail store owners to make them aware of stolen food stamps that are being distributed in the Chicagoland area, and that's the list that he was referring to.

Q: Did you ever tell the Defendant about any such list?

A: No, I didn't.

Q: Is this the first time you brought up the subject of a list?

A: Yes.

Q: Did he initiate the conversation about the list or did you?

A: He did.

Q: Now, can you tell us approximately at what point Charley joined in on the conversation?

A: When we were in the back of the room, this was after the price had been negotiated that he was going to give me $350.

Frank—excuse me, Charley came in at the point when (Tr. 96) the transaction—the arms length transaction of the money and the food stamps was to take place. Charley was the person who I gave the food stamps to. At that point, Charley examined the food stamps and he gave me—counted out $350 in cash to me.

Q: Did you have any conversation with Charley at that time about Frank's interest in food stamps?

A: Well, yes, we did talk about that. He was saying to the effect that he bangs his head against the wall and

Frank just goes on, you know—something to that effect. That he just continues to do this. But that's about the basis of the conversation.

Q: Now, on April 3rd, was that transaction also recorded on tape?

A: Yes.

• • • •

(Tr. 110)

Q: What was your role in the May 6th event and what was Agent Wright's role?

A: My role was to act as undercover and Agent Wright was to act as my surveillance.

Q: Regarding the stamps—did you have stamps with you on that day in your undercover capacity?

A: Yes, I did. On that day I had approximately ten fifty-dollar food stamp books valued at five-hundred dollars.

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(Tr. 112)

Q: Did there come a time when you arrived at Moon's Sandwich Shop?

A: Yes, we did.

(Tr. 113)

Q: What did you do when you got there?

A: When I arrived at Moon's Sandwich Shop, I again placed the recorder on my person. I exited the car and began putting my introduction on the tape and I entered Moon's Sandwich Shop.

Q: And where was Agent Wright at that time?

A: At that time Agent Wright remained in the car, outside of the sandwich shop.

Q: Now, what did you do when you got inside and, also, if you can, describe for us how many customers were inside and how many employees.

A: Okay. There were approximately four employees inside the restaurant, and I would say there were approximately five to eight customers inside the restaurant.

I entered the restaurant. I sat down at the far left side of the counter on a stool where I was approached by Frank.

Q: Did you have a conversation with him at that time?

A: Yes.

Q: And was anyone else party to the conversation?

A: No.

Q: Was anyone else ever a party to the conversation?

A: No.

Q: Where did that conversation—during the entire course of that conversation, where did it take place?

A: Okay, our conversation—we talked in the front of (Tr. 114) the store, but as we—as our conversation intensified, we moved to the back of the restaurant, in the same back room where the other two transactions had occurred.

Q: Now, at whose suggestion did you move yourselves to the back room?

A: At Charley's—excuse me, at Frank's suggestion. He physically motioned me again, you know, while we were talking, he motioned me to come to the back.

Q: All right. Now, can you relate what you said and what the defendant said in that conversation?

A: I told him that I had five hundred dollars in food stamps, and he contemplated for a few moments and he told me to give him $350. He also told me that he would really get rid of the stamps for me, that he could hustle for me, if he got fifty dollar food stamps.

And I said, "Well, you know, I'm going to have to discuss this with my man, you know. I will get back to you. I will have to discuss this with him first."

He said, "Well, you know, I can really hustle for you. I can really get rid of them." So I said fine, and we proceeded to conduct the transaction, and I told him I would get back with him, and I left the restaurant.

Q: What if anything did the defendant say about Charley in that conversation?

A: He said Charley was scared, Charley didn't want to do (Tr. 115) the stamps. He didn't want the stamps in his place, and that he was scared, but he could really hustle for me if I could give him a cut.

Q: Now, was this May 6 transaction recorded on tape?

A: Yes, it is.

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[CROSS-EXAMINATION]

(Tr. 132)

Q: All right. This report of yours, Exhibit 3, is labeled Georgia Farms, is that correct?

A: Correct.

Q: And it says that the matter was referred to you by the Compliance Branch of the Food and Nutrition Service, is that correct?

A: Correct.

Q: In fact that's where most of the investigations that you conduct come from, isn't it, from the Compliance Branch?

A: Yes.

Q: And then—and you had one transaction where you bought food stamps at Georgia Farms Food Store, is that right?

A: Yes.

Q: And then the next time you went back there, they said they didn't want to buy any more food stamps, isn't that right?

A: No.

Q: Well, isn't it true that on March 25, when you went there and talked to Vince, he said that the owners had sent a (Tr. 133) letter from the Food and Nutrition Service and they were scared to buy food stamps—is that what he told you?

A: Partly, yes.

Q: Well, and he tells you why don't you try Moon's Sandwich Shop, right?

A: Well, from my recollection, he told me that, yes, they had received letters from the Food and Nutrition Service and that they were scared, at that time, to buy stamps but to check with him maybe this weekend, and he then referred me to Moon's Sandwich Shop.

Q: You couldn't buy them any more at Georgia Farms, because they got a letter from the Food and Nutrition Service and then they wouldn't buy them any more, is that right?

A: I didn't—I don't know. I don't know if they would buy them again or not.

Q: Well, you didn't sell them any more?

A: No, I didn't sell them any more that day.

Q: Now, did the Food and Nutrition Service send a warning letter to Moon's Sandwich Shop?

A: No.

Q: You just went in there—on the recommendation of this Vince, right?

A: Yes.

Q: Did you get a case referred to you from the Food and Nutrition Service on Moon's Sandwich Shop?

(Tr. 134)

A: No, but I was advised by my supervisors to go on over there.

Q: And Moon's Restaurant was not a member of the Food Stamp Program, is that correct?

A: No.

Q: And Moon's Sandwich Shop had not received a visit from a compliance officer of the Food and Nutrition Service as far as you know?

A: No, they didn't.

Q: And Moon's Restaurant had not received a pamphlet of regulations of the Food Stamp Program as far as you know?

A: No.

Q: And Moon's Sandwich Shop had not received any warning letters from the Food and Nutrition Service, is that right?

A: Right.

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Richard Johnson

(Tr. 151)

DIRECT EXAMINATION

BY MS. DE MAIO:

Q: Sir, will you please state your name?

A: Richard Johnson.

Q: By whom are you employed, Mr. Johnson?

A: American Bank Note Company.

Q: And what kind of company is American Bank Note?

A: We are security printers. By security printing, I mean documents that you do not want counterfeited. Examples (Tr. 152) of that would be travelers checks, stocks and bonds, foreign currency, food stamps with the Government.

Q: Is American Bank Note a privately owned company?

A: It's publicly owned. It's listed on the American Stock Exchange.

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(Tr. 153)

Q: And I believe you testified that you print food stamps. Is that for the United States Department of Agriculture?

A: Yes, it is.

• • • •

(Tr. 157)

Q: Do you know what message was printed on the back inside cover of the books that those specific coupons came in?

A: Yes, all fifty-dollar books produced in the 1981 series had this message.

Q: Would you please read that to the members of the jury?

A: "Food stamp reminder: Persons using illegally obtained food stamps may be found guilty of a felony and subject to a fine, imprisonment or both."

MS. DE MAIO: We have no other question at this time, Your Honor.

THE COURT: Cross.

CROSS EXAMINATION

BY MR. HUYCK:

Q: Has that warning always been on food stamp coupon books that your company has printed?

A: On all food coupon books, no, sir.

Q: Has it always been on 50 dollar coupon books?

A: Yes.

Q: But there are coupon books that don't have the warning on it?

(Tr. 158)

A: Yes.

Frank Liparota

(Tr. 167)

FRANK LIPAROTA, called as a witness by and on his own behalf, having been first duly sworn, was examined and testified as follows:

THE COURT: Be seated, please. Now, take it easy, Mr. Liparota. Keep your voice up so that the last two jurors can hear all of your testimony. Mr. Huyck, you may proceed.

DIRECT EXAMINATION

BY MR. HUYCK:

Q: State your name please?

A: Frank Liparota.

Q: You are the Defendant in this case, is that correct, Mr. Liparota?

(Tr. 168)

A: Yes, sir.

Q: Where do you live sir?

A: Where I live.

Q: Yes.

A: 1265 Sterling Avenue in Palatine, Illinois.

Q: And who do you live there with?

A: My wife and daughter.

Q: And do you have any other children?

A: I have a boy.

Q: How old are you?

A: I'm 64.

Q: Now, you have been connected with the Moon's Sandwich Shop on West Roosevelt Road, is that correct?

A: That's right, sir.

Q: Were you one of the owners of that sandwich shop?

A: Part owner.

Q: And who is the other owner?

A: My brother.

Q: And what's his name?

A: Charles.

Q: Now, how long were you connected with that particular sandwich shop?

A: We have been there since 1936.

Q: And who started that sandwich shop in 1936?

A: My dad.

(Tr. 169)

Q: How long have you yourself worked there in the sandwich shop?

A: About 40 years.

Q: And during that 40 years, were you actually there every day in the sandwich shop?

A: Yes.

Q: What did you do, and what did your brother Charley do in the sandwich shop?

A: Well, I did the short order cook. I was—he did most of the buying, and he worked a few hours during the day.

Q: Now, how big is that restaurant? How many customers will it seat?

A: It will seat about 24.

Q: And is most—is there a counter there?

A: Yes.

Q: And also tables?

A: Yes. About four tables, and the counter sits about twelve people.

Q: What kind of food do you serve there?

A: Well, we served hamburgers, hot dogs, steak sandwiches, and spaghetti, beef sandwiches, and coffee and pop.

Q: Now, where precisely is that restaurant located.

A: 1649 Roosevelt Road.

Q: And could you tell us between what streets that is?

A: That's between Roosevelt and Paulina—I mean (Tr. 170) Ashland and Paulina.

Q: Now, in the forty years you were there, were there any changes that took place in that neighborhood?

A: Well, there was—the changes occurred during the latter part of the years. It was a very nice neighborhood at one time, but during the years that progressed, the neighborhood got bad.

Q: And last year, in 1982, how would you describe the neighborhood at that time?

A: Very bad.

Q: All right. Did you have a habit of doing favors for your customers there in the restaurant?

A: Well, sometimes they were hungry, and the customers that we had for many, many years—things got kind of rough during the latter part of these years, now, and we usually gave them something, you know, to eat, if they asked for it.

Q: Any other kind of favors?

A: Well, borrowed them money if they were short of money, you know, they need the money.

Q: Did you ever see food stamps there in the restaurant?

A: Well, once in a while they would come in and they would eat, you know, and they would drop—like a food stamp and just walk out. So I had to take the food stamp anyway.

Q: Now, did Moon's Restaurant ever join the Food Stamp Program?

(Tr. 171)

A: No.

Q: Did you have any way of turning in food stamps to your bank?

A: No.

Q: Has that restaurant now been closed?

A: Well, it's been closed now. I went in the hospital, it was in September, around September 14, and my brother just couldn't run the store any more alone, so when I got out from the hospital, I went back there, and business was so bad that we had to close up.

Q: Now, Mr. Liparota, the agent, Sherrye Hampton, who was here testifying yesterday—

A: Yes.

Q: Do you remember her ever coming into Moon's Sandwich Shop last year?

A: She did come into the store.

Q: All right. Now, the first time she came in, did she sell any food stamps there in your restaurant?

A: Well, she came in the first time, and she said that someone sent her from Halsted Street, and then she mentioned a name later on, that—Vince.

Well, I didn't recall it right away but the boy did work for us years back, and she had—she told me would I like to buy some food stamps. I said, "Well, let me talk to Charley," because I didn't have nothing to do with the food (Tr. 172) stamps.

So I went back in the back room and I asked, "This lady's got 95 dollars worth of food stamps, what do you want to give for it?" He said, "Well, give her a hundred fifty dollars." So I told Ms. Hampton if she wanted $150, and she said, "That's cool." So Charley paid her.

Q: Charley paid her for the stamps?

A: Yes.

Q: Who did she give the stamps to?

A: Charley.

Q: Of course, you didn't know she was a Government Agent, is that right?

A: No.

Q: You thought she was someone from the neighborhood?

A: I figured—mostly a lot of people come in there. I know it's a poor neighborhood and they have to pay their gas bill and their light bill, and they do get rid of their food stamps that way to pay their bills.

Q: In that neighborhood, do people sell food stamps frequently to each other?

A: Well, I seen transactions in the store time and time again with customers, you know. They come in. They do sell—they do sell their food stamps.

Q: All right. Now, did this Agent Hampton come back again and sell some food stamps?

(Tr. 173)

A: Well, she came back, I think about a week or two later. I can't recall this, because this is getting back into March or April. Some months back there. And she did come in the second time and she says that she had, I think was, five hundred dollars worth of food stamps.

So I told her, I says, "I don't have no money for food stamps but let me see if Charley wants them." So I went in the back room, and he says, "Tell her to come back here." So that's what she did. Whatever took place after that I don't recall that, anything about that.

Q: So she went into the back room with Charley?

A: That's right.

Q: And you didn't go back there?

A: No, sir.

Q: Now, we listened to a tape yesterday that the agent said was made on April third, which she said was the second time she had gone in. And it was the tape where we didn't have a transcript and there was a lot of noise.

A: Yes.

Q: But you could pick out a voice now and then of someone talking to the agent.

Now, was that your voice that we heard or was that Charley's voice?

A: That was Charley's voice.

Q: Now, did the agent—was there any conversation that (Tr. 174) you heard—at that time the agent came in—about these food stamps being stolen?

A: No, she said that these stamps were good, they are not stolen stamps.

Q: You heard her say that?

A: She did say that.

Q: All right. Now, after that, did you yourself have a transaction with Agent Hampton?

A: Well, she came in the third time, and she had—she told me she had five hundred dollars worth of food stamps. I told her, I says, "Well, I don't have any money for food stamps right now, but I probably maybe could get rid of them for you."

And I went to the phone and I couldn't contact the person that I was supposed to call. So I told her if she wants to leave the stamps here, and I would try to get rid of them for her, and she says, "No, I can't leave them here."

So I says, "Well, I will find out for you if I could sell them." And she says—she says—I told her, "Well, what did you want for them so I can tell the party." She says, "Well, I will take three hundred dollars for them."

And so she—she said, "I will be back in a few days." So she left. In the meantime, the party—I couldn't contact, so I told her I would try to get rid of them for her.

So this party came in the one morning, this fellow, (Tr. 175) and I asked him, I said, "Would you like to buy some food stamps?" And he says, "Sure." So I says, "She's got five hundred dollars worth, and I will take three hundred for them. She will give me three hundred for them." So I says, "I will do her the favor. I will try to get rid of them for her."

So the agent did come back in about—I couldn't say it was one or two days, but she did come back, and I told her that this fellow would take them from her, and I said if she would like to leave the stamps. And she says, "No, I can't leave the stamps, I got to have the cash."

So I said, "Well, I says, he didn't leave me no money." So I said, "I will see—he said he was going to come back," I says, "maybe tomorrow," I says.

So actually, he did come back and he left me the three hundred dollars in the morning, and she returned, I think it was, in the afternoon sometime.

So she came in and I told her, "Ms. Hampton, I got that money for you for the stamps." She says, "Oh, that's cool." I said, "We better go in the back because you can't have no transactions out in front because you have these people that will take them away from you."

And she had some stamps sticking out of her pocket, and I told her, "You better take those stamps out of your pocket because they will take them out of your pocket when you go out of the store." So she came—I told her to come in (Tr. 176) the back room.

So I told her, I says, "Here is the three hundred and give me the stamps, and I will give them to the fellow when he comes in."

She says okay. And we made that transaction. And then this time she says, "I can get more stamps for you, if you want them." I says, "Well, what would you give

me for them?" She says, "Well, we will see when I get them."

I says, "Well if you give me a fifty dollar book stamp I probably could get rid of some for you." Shes says, "That's cool, I will ask my boyfriend." And I guess that's it.

Q: Was that three hundred dollars you gave her—was that your three hundred dollars?

A: No. That's the party that was supposed to take the stamps.

Q: Did you—were you buying the stamps yourself?

A: I—the stamps were not for me. I was buying them for this party. His name was Bob.

Q: Did you have any idea that what you were doing then was against the law?

A: No, I didn't have any reason to know—because I don't know the food stamp law.

MR. HUYCK: That's all I have.

TRANSCRIPT OF CONFERENCE ON INSTRUCTIONS

(Tr. 204)

MR. HUYCK: Your Honor, I have tendered a specific intent instruction.

THE COURT: I know, and it's not to be given. This is not a specific intent crime.

MR. HUYCK: Could I make a brief statement on that?

THE COURT: Go right ahead and make your statement. It's not a specific intent case. It's a knowledge case.

MR. HUYCK: I think in the circumstances of this case, where you have persons who are not registered under the Food Stamp Program, I think that it is necessary before punishing them for a felony that you prove that they knew that they were violating the law.

(Tr. 205)

I don't see how you can make an absolute liability offense of a regulatory type offense like this that is [sic] applicable to all people. I can see how you can do it—put that duty on people who are regulated by the program, but I don't see how you can put that duty on the population generally.

I think that this is a classic example of a case where you are going to make a—make it generally applicable to everyone, and make a felony, then you can only punish people who knew that they were acting unlawfully.

THE COURT: Well, I believe that he must knowingly purchase. He has to know what he's purchasing. This is not a specific intent offense. It's contrabrand, and that's it. He knows that he's purchasing it.

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(Tr. 215)

MR. HUYCK: And on the other ruling on specific intent, (Tr. 216) do I interpret that I am forbidden to

argue ignorance of the law? In other words, I am forbidden to say to the jury, "You should acquit this man because he was not aware that what he was doing was against the law?"

THE COURT: I think that's correct, yes. I don't think that that is appropriate. You may argue his general knowledge, the situation in which he found himself, that he didn't buy the stamps. There are a lot of things that you can argue for Mr. Liparota.

MR. HUYCK: Well, there are facts that I can recite, but I will just have to leave the bottom line out, and say these add up to a reason to acquit the Defendant.

THE COURT: Well, I think it is a misstatement of the law for you to make the argument—the last argument you just suggested. Therefore, I am not going to permit that. . .

TRANSCRIPT OF INSTRUCTIONS

(Tr. 250)

THE COURT: When the word "knowingly" is used in these instructions, it means that the Defendant realized what he was doing, and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident. Knowledge may be proved by defendant's conduct and by all of the facts and circumstances surrounding the case.

DEFENDANT'S INSTRUCTION NO. 2 (REFUSED)

(R. 48)

The crime charged in this case is a serious crime which requires proof of specific intent before the defendart can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Defendant's Instruction No. 2

Devitt & Blackmar Sec. 14.03

TRANSCRIPT OF SENTENCING

EXCERPT OF TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable PRENTICE H. MARSHALL, one of the Judges of said Court, in his courtroom in the United States Courthouse, 219 South Dearborn Street, Chicago, Illinois 60604, on Tuesday, May 10, 1983, at 9:00 a.m.

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(Tr. 3)

But I want you to know that I feel badly about the fact that you have been prosecuted. I think it would have been quite enough in this case for somebody to have shown up in Mr. Liparota's restaurant one day, and taken him and his brother in the back room and said, "Look, you guys, we know you bought some food stamps. Now, cut it out."

And to crank up the machinery of Government and to impose it upon these two men in literally the twilight of their life, I just—I just do not understand it.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 735 F.2d 1044.

* * * *

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 83-1879

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

FRANK LIPAROTA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 82 CR 664—Prentice Marshall, *Judge*

ARGUED JANUARY 5, 1984—DECIDED JUNE 4, 1984*

Before ESCHBACH, POSNER, and COFFEY, *Circuit Judges.*

COFFEY, *Circuit Judge.* The defendant, Frank Liparota, appeals his conviction of three counts of acquiring and possessing food stamps in violation of 7 U.S.C. § 2024(b) (1977). We affirm.

* This opinion has been circulated among all judges of this court in regular active service. Only one judge favored a rehearing *en banc* on the question of whether this opinion creates a conflict with the Eighth and Tenth Circuit decisions in *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1768 (1983) and *United States v. O'Brien*, 686 F.2d 850 (10th Cir. 1982).

Liparota and his brother, Charles LaPort, owned a sandwich shop in Chicago, Illinois, known as Moon's. The restaurant had never been authorized to participate in the food stamp program.

At trial, Special Agent Sherrye Hampton of the United States Department of Agriculture testified that she received information in March of 1982 from one of the appellant's former employees that she might be able to sell food stamps at the restaurant. Based on this information, Hampton began her investigation with a visit to Moon's restaurant on March 27, 1982 (on each visit to the restaurant, Agent Hampton was equipped with a recording device). On that date, she approached a man behind the counter and asked to speak to Frank. The appellant responded that he was Frank (Liparota). Hampton informed Liparota that she had $195.00 worth of food stamps for sale. He asked her how much she wanted for them; she responded, "whatever is fair." In response, Liparota offered to pay $150.00 for the stamps. Hampton was then directed to a back room in the restaurant where LaPort gave her $150.00 in cash for the food stamps.

On April 3, 1982, Hampton returned to Moon's. She testified that Liparota approached her while she was seated at the lunch counter. She informed him that she had $500.00 worth of food stamps for sale and he again asked her how much she wanted for them whereupon she responded, "Well, whatever is fair, you tell me what you think." She testified that Liparota on this occasion offered her $350.00 for the stamps although she was actually paid only $300.00.

Hampton visited the restaurant again on May 5, 1982, with another $500.00 supply of food stamps. She testified that the defendant informed her that he had no money

at that time to purchase the stamps, thus a meeting was arranged for the following day. On the next day, Hampton testified that she was paid $350.00 for $500.00 worth of food stamps. She also stated that Liparota offered to "hustle" food stamps for her in exchange for $50.00 worth of food stamps.

At trial, Liparota admitted setting the price for the food stamps purchased on March 27, 1982, denied taking part in the actual sale, and also denied participating in the other transactions, testifying that it was not his voice on the tapes. The tapes of each transaction were played several times for the jury.

The jury found Liparota guilty of all three counts of acquiring and possessing food stamps in a manner not authorized by 7 U.S.C. § 2024(b) (1977). A sentence of three hours in prison was imposed and suspended. The defendant appeals.

The appellant argues that the trial court limited the government to proving a violation of 7 C.F.R. § 278.2(a) (1978).[1] He maintains that this provision is inapplicable in his case because he did not operate a retail food store. He contends that the inapplicability of the regulation, coupled with the trial court's limiting instruction, requires reversal of his conviction. We disagree.

From our examination of the record we are unable to ascertain which of the trial court's rulings the defendant questions in his claim that the trial court limited the government solely to a prosecution under 7 C.F.R. § 278.2 (a) (1978). The government specified 7 U.S.C. § 2024 (b) in both the indictment and its response to Liparota's

[1] "Sec. 278.2 Participation of retail food stores.

"(a) Use of coupons. Coupons shall be accepted by an authorized retail food store only in exchange for eligible food. Coupons may not be accepted in exchange for cash, except when cash is returned as change in a transaction in which coupons were accepted in payment for eligible food, under paragraph (d) of this section. Coupons may not be accepted in payment of interest on loans, or for any other nonfood use."

Motion for Bill of Particulars as the section Liparota had allegedly violated. While the response to the defendant's motion also included a reference to 7 C.F.R. § 278.2 (a) (1978), it is clear that the government was required only to prove a violation of 7 U.S.C. § 2024(b) (1977) in order to obtain a conviction. Therefore, we need not determine whether the provisions of 7 C.F.R. § 278.2(a) (1978) are applicable to persons or groups other than retail food stores.

Section 2024(b) states in relevant part that:

> "[W]hoever knowingly, uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony. . . ."

7 U.S.C. § 2024(b) (1977). Thus, acquisition and possession of food stamps violates 7 U.S.C. § 2024(b) unless there is an affirmative authorization for such acquisition or possession.

The language of section 2024(b) is broadly stated. It clearly prohibits any form of dealing in food stamps, whether by a participant or non-participant in the food stamp program, unless there has been some specific authorization for a person or organization to trade in food stamps in a specified manner under 7 U.S.C. § 2011 *et seq.* Thus, a person violates section 2024(b) by using, trading, transferring, acquiring, purchasing or selling food stamps absent specific authorization to do so.

There is no authorization anywhere in the Code or regulations for anyone to purchase food stamps. Indeed, as this court stated in *United States v. Wilson*, 438 F.2d 479 (7th Cir.), *cert. denied*, 402 U.S. 929 (1971), the "provisions are apparently designed to prevent trafficking in such coupons." *Id.* at 481. While the provisions at issue in that case involved purchase of food stamps by

a participant in the food stamp program, the broad language of section 2024(b) clearly does not limit the congressional prohibition to participants in the program. Rather, it forbids any person to purchase food stamps.

In light of the broad language of section 2024(b), the trial court limited the prosecution to proof that Liparota violated the statute by *purchasing* the stamps.[2] We believe the prosecution did this to the satisfaction of the jury and we decline to overrule the jury verdict on these grounds.

The appellant's second argument is that the trial court erred in failing to instruct the jury on the meaning of "willfully" because the indictment charged him with knowingly and willfully purchasing the food stamps contrary to 7 U.S.C. § 2024(b) (1977). We find this contention to be without merit as § 2024(b) clearly states that only a finding of general intent is necessary to sustain a conviction.

We are aware that other circuits have held that a specific intent instruction must be given in a prosecution under 7 U.S.C. § 2024(b). *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 1768

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[2] The trial court stated:

> "I think there is a more serious question, and that is whether under the bill of particulars the Government should be permitted to argue alternatively that Mr. Liparota committed an offense because he received food stamps under any circumstances, not being a certified participant in the program. . . .
>
> "The statute says that unless you are authorized to receive food stamps, thou shalt not receive them. . . . He's not authorized to receive them. So if he hadn't paid a dime for them, one can argue that he would violate 2024(b).
>
> "That, however, is not the charge that the Government has brought against him in light of the bill of particulars. . . . I am going to confine the Government in its theory of the case to the proposition that Mr. Liparota violated the statute when he purchased the stamps for cash."

Trans. 165-66.

(1983); *United States v. O'Brien*, 686 F.2d 850 (10th Cir. 1982). Both courts held that the adverb "knowingly" as used in section 2024(b) modifies the verbs "uses, transfers, acquires . . ." and the phrase "in any manner not authorized . . . ." *Marvin*, 687 F.2d at 1226; *O'Brien*, 686 F.2d at 853. Therefore, both courts found that section 2024(b) requires a finding of specific intent. We respectfully disagree and hold that section 2024(b) only requires proof that a defendant knowingly used, transferred, acquired or possessed food stamps or authorization cards and that such use, transfer, etc. was unauthorized.

The Tenth Circuit noted, "7 U.S.C. section 2024(b) is simply not clear on its face, and, on the contrary, is ambiguous. The statute can be read either way." *O'Brien*, 686 F.2d at 852. The court stated that section 2024(b) can be read so that:

> "the adverb 'knowingly' modifies only the verb 'acquire,' and does not modify the ensuing clause 'in a manner not authorized by this chapter or the regulations issued pursuant to this chapter . . . . [or] that the word 'knowingly' modifies not only the verb 'acquire,' but also the ensuing clause."

Id. at 851-52. However, a comparison of the placement of the word "knowing" in 7 U.S.C. § 2024(c) (1977)[3] to the placement of the word "knowingly" in section 2024(b) is evidence that Congress "knew how to place the word . . . in such a way as to require unambiguously that a person know he is acting contrary to law." *Mar-*

---

[3] 7 U.S.C. section 2024(c) (1977) provides in relevant part:

> "Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter shall be guilty of a felony. . . ."

vin, 687 F.2d at 1226. In view of the fact that Congress knew precisely how to create a specific intent offense, and did so in the provision immediately following the section at issue here, we find that section 2024(b) cannot be characterized as ambiguous. It must be held that Congress intended to require only proof of general intent.

With respect to the defendant's argument that the inclusion of the word "willfully" in the indictment required the government to prove specific intent, this court has held that allegations in an indictment not essential to prove the crime charged are mere surplusage. *United States v. Green*, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). Such allegations need not be proved nor embodied in instructions to the jury. *United States v. Harper*, 579 F.2d 1235 (10th Cir.), *cert. denied*, 439 U.S. 968 (1978); *Milentz v. United States*, 446 F.2d 111 (8th Cir. 1971).

Additionally, this court has specifically disapproved of boiler plate specific intent instructions where the trial court "adequately instructs on the requisite mental state by other means." *United States v. Arambasich*, 597 F.2d 609, 613 (7th Cir. 1979). Indeed, in *Arambasich*, this court disapproved of the very instruction tendered by the appellant. *Id.* at 610-11; *see* 1 E. Devitt & C. Blackman, Federal Jury Practice and Instructions, section 14.03 (3d ed. 1977).

The trial court appropriately instructed the jury on general intent and was equally correct in refusing to give the tendered specific intent instruction to the jury. Specific intent is not required for a conviction under 7 U.S.C. § 2024(b) (1977) and we hold an instruction on specific intent could very well have confused rather than enlightened the jury on the element of intent.

The appellant's final argument is that the trial court erred in failing to instruct the jury on entrapment. It is well-settled law in this circuit that a defendant must admit to the commission of the offenses for which he is

tried in order to properly raise an entrapment defense.[4] In *United States v. Kaiser*, 138 F.2d 219 (7th Cir. 1943), the defendant was found guilty of selling morphine. This court stated "[i]t is difficult to conceive of a competent attorney arguing to a court and jury that the defendant did not make the alleged sales, but, if so, he was entrapped." *Id.* at 220. In *United States v. Roviaro*, 379 F.2d 911 (7th Cir. 1967), we refused to overturn the defendant's conviction for selling heroin, stating ". . . defendant admitted no criminal acts. In such a situation, it has been held that a defendant may not use the entrapment defense." *Id.* at 914 (citations omitted). In *United States v. Johnston*, 426 F.2d 112 (7th Cir. 1970), this court reiterated its previous holdings that "absent admission of the act an instruction on entrapment will not be submitted to the jury." *Id.* at 114.

Finally, in *United States v. Nicosia*, 638 F.2d 970 (7th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), this court refused to overrule *Johnston* because "the evidentiary record on appeal is devoid of any evidence in support of a defense of entrapment calling for an appropriate jury entrapment defense instruction." *Id.* at 973. Thus, it is clear in this circuit that a defendant must admit the alleged acts which constitute the crime with which he is charged in order to raise an entrapment defense.

Here, the appellant denied any participation in the transactions that occurred on April 3 or May 6, 1982. With respect to the transaction of March 27, 1982, Liparota admitted only to the discussion concerning the price of the stamps with Hampton and the introduction of Hampton to his brother, who in turn purchased the stamps. We

---

[4] Other circuits have held that a defendant need not admit the acts of the alleged crime in order to raise an entrapment defense. *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (*en banc*); *United States v. Harrell*, 436 F.2d 606 (5th Cir. 1970), *cert. denied*, 409 U.S. 846 (1972); *Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962).

hold the record fails to disclose any evidentiary foundation for the presentation of entrapment instructions to the jury and thus we hold the trial court did not err in refusing to instruct the jury on this issue.

The jury verdicts are AFFIRMED.

A true Copy:

Teste:

. . . . . .

Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Coffey

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
June 4, 1984

Before

HON. JESSE E. ESCHBACH, *Circuit Judge*

HON. RICHARD A. POSNER, *Circuit Judge*

HON. JOHN L. COFFEY, *Circuit Judge*

No. 83-1879

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE
vs.
FRANK LIPAROTA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 82 CR 664—Judge Prentice Marshall

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this date.

SUPREME COURT OF THE UNITED STATES

No. 84-5108

FRANK LIPAROTA, PETITIONER

v.

UNITED STATES

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 29, 1984

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PETITIONER'S

BRIEF

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No. 84-5108 (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK LIPAROTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether in a prosecution under 7 U.S.C. Sec. 2024(b) the government must prove that the defendant knew that his acquisition of food stamps was not authorized by law.

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BRIEF OF PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 735 F.2d 1044.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTE INVOLVED

This case involves Title 7, U.S.C. Sec. 2024(b), and Sec. 2024(c), which read as follows:

> (b) Unauthorized use, transfer, acquisition, alteration, or possession of coupons or authorization cards; restitution by convicted individuals.
>
> (1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulation issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000 or, if such coupons or authorization cards are of a value of less than $100, shall be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any

person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program.

(2) In the case of any individual convicted of an offense under paragraph (1) of this subsection, the court may permit such individual to perform work approved by the court for the purpose of providing restitution for losses incurred by the United States and the State agency as a result of the offense for which such individual was convicted. If the court permits such individual to perform such work and such individual agrees thereto, the court shall withhold the imposition of the sentence on the condition that such individual perform the assigned work. Upon the successful completion of the assigned work the court may suspend such sentence.

(c) Presentation for payment or redemption of coupons that have been illegally received, transferred or used.

Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony and, upon the first conviction thereof, shall be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than one year nor more than five years and may also be fined not more than $10,000, or, if such coupons are of value of less than $100, shall be guilty of a misdemeanor and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of

a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

STATEMENT OF THE CASE

Defendant and his brother, Charles LaPort, were named in a three-count indictment returned September 22, 1982. LaPort pled guilty prior to trial. The indictment charged three purchases of food stamps from an undercover agent: (1) $150 for $195 face value of stamps on March 27, 1982; (2) $350 for $500 face value of stamps on April 3, 1982; and (3) $300 for $500 face value of stamps on May 6, 1982. (J.A. 2).

Defendant, his brother and father operated Moon's Sandwich Shop on West Roosevelt Road in Chicago for 46 years until it was closed in 1982. It was a small restaurant, seating 24 people at a counter and tables. In recent years, the neighborhood had become very bad. (J.A. 24-25). The restaurant was not a member of the Food Stamp Program, and defendant was not familiar with the food stamp regulations. (J.A. 26, 30).

Agent Sherrye Hampton initiated her undercover investigation of Moon's based on a "tip" received during an investigation of a food store. (J.A. 21). Agent Hampton went to Moon's wearing a hidden tape recorder and offered to sell food stamps. On her first visit, she approached petitioner at the counter, and after some discussion, he offered her $150 for $195 worth of food stamps. She then went to a back room with the co-defendant LaPort, and sold the stamps to him. (J.A. 11-13). Petitioner, in his testimony, substantially agreed with this account. (J.A. 26-27).

On the Agent's second visit, she again approached petitioner at the counter, and after some discussion he offered $350 for $500 worth of food stamps. Again, she actually sold the stamps to the co-defendant LaPort in the back room. (J.A. 14-18). Petitioner substantially agreed with this account, except that he attributed more of the conversation to his codefendant. (J.A. 27-28).

The third transaction took place a month after the first two. This time, petitioner purchased $500 worth of food stamps from the Agent, and offered to get rid of additional stamps for her. (J.A. 18-20). Petitioner admitted the transaction, and testified that he was purchasing the stamps on behalf of someone else. He also admitted the offer to get rid of additional stamps for her. (J.A. 28-30).

The indictment charged that defendant "willfully and knowingly" acquired the stamps. Defendant, in his testimony, denied that he acted willfully, in that he was not familiar with the pertinent regulations making it illegal to acquire food stamps for cash. (J.A. 30).

The jury were not instructed on the meaning of the term "willfully." They were instructed that "knowingly" means that "defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident." (J.A. 33).

Defendant tendered a specific intent instruction taken from Devitt & Blackmar, *Federal Jury Practice and Instructions*, Sec. 14.03, which reads as follows:

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case. (J.A. 34).

The Court refused this instruction over objection, stating, "I believe that he must knowingly purchase. He has to know what he's purchasing. This is not a specific intent offense. It's contraband, and that's it. He knows that he's purchasing it." (J.A. 31). Further, the Court ruled that defense counsel could not argue ignorance of the law to the jury. (J.A. 31-32).

Defendant was convicted after a jury trial and sentenced to "Three hours on counts 1, 2 and 3. Sentences considered served." (J.A. 1).

At sentencing, Judge Marshall commented on the evidence as follows:

> ". . . I want you to know that I feel badly about the fact that you have been prosecuted. I think it would have been quite enough in this case for somebody to have shown up in Mr. Liparota's restaurant one day, and taken him and his brother in the back room and said, 'Look you guys, we know you bought some food stamps. Now, cut it out.'
>
> And to crank up the machinery of Government and to impose upon these two men in literally the twilight of their life, I just—I just do not understand it." (J.A. 35).

SUMMARY OF ARGUMENT

1. The most natural reading of the statute is that "knowingly" modifies the entire phrase "acquires coupons in any manner not authorized by this chapter," not that it modifies merely "acquires coupons." This reading is supported by the general perception that the statute deals with "fraud;" by the probability that Congress wouldn't insert the word "knowingly" merely to preclude

the unlikely prosecution of someone who didn't know he was acquiring food stamps; by the parallel construction with the following subsection; by the fact that the government's construction would mean that non-participants were subject to strict liability while participants, who are the subjects of the following subsection, are not; and by the construction given by courts to similar statutes of the "catch-all" variety. Petitioner is not urging a broad "specific intent" rule, but merely a narrow instruction focused on "knowledge" of the "attendant circumstance" defined by the statute; i.e., that the coupons were acquired in a manner not authorized by law. Two rules of construction contained in the Model Penal Code also support petitioner's reading of the statute. These are the rule that where a culpability term does not distinguish between elements of an offense, it applies to all the elements [Sec. 2.02(4)], and the rule that when no culpability term is stated as to an element, the appropriate culpability is either purposely, knowingly, or recklessly [Sec. 2.02(3)].

2. At the least, there is an ambiguity as to whether "knowingly" modifies the entire phrase, or merely "acquires coupons." The legislative history provides no assistance. In this circumstance, the Court should apply the rule of lenity and adopt petitioner's reading.

3. This Court should apply the general policy against inferring strict liability in an offense punishable by a substantial prison term. This statute does not involve the two established exceptions to this policy: situations involving inherently dangerous materials, and elements which merely define the basis of Federal jurisdiction.

4. A broad range of fact situations would be brought under a strict liability rule under the government's reading of the statute, a result Congress could not have intended.

5. Strict liability is not necessary in the policing of the food stamp program because of the extensive notice of its regulations which is given to participants, who are the natural targets of enforcement actions.

ARGUMENT

I. The Most Natural Reading Of The Statute Is That "Knowingly" Modifies Both "Acquires Coupons" And The Succeeding Phrase, "In Any Manner Not Authorized . . ."

The statute in this case provides in pertinent part that "whoever *knowingly* . . . acquires . . . coupons . . . in any manner not authorized by this chapter" is guilty of an offense. The court below held that the word "knowingly" modifies only "acquires" and "coupons," but not "in any manner not authorized by this chapter." The Eighth Circuit Court of Appeals, on the other hand, held that "purely as a verbal matter, the word 'knowingly' . . . may naturally be read to modify the entire remainder of the clause in which it appears, including the phrase 'in any manner not authorized,' etc." *United States* v. *Marvin*, 687 F.2d 1221, 1226 (8th Cir. 1982). The latter reading is the most natural and correct one. Although petitioner recognizes that "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language," *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), it is clearly a natural reading of the sentence to include both the element specifying the nature of the conduct and the element specifying the attendant circumstances in one phrase, "acquires coupons in any manner not authorized by this chapter," and to read the adverb "knowingly" as modifying the entire phrase.

Petitioner's reading of the statute is also supported by the general perception that the statute deals with "fraud." This Court, for instance, stated that sections

2024(b) and (c) "specifically impose strict criminal penalties upon any individual who obtains or uses food stamps fraudulently." *U.S. Department of Agriculture* v. *Moreno*, 413 U.S. 528, 536 (1973). Similarly, the court in *Jacquet* v. *Westerfield*, 569 F.2d 1339, 1345 (5th Cir. 1978), characterized these provisions as "dealing with fraud." Until recently, the government itself apparently read the statute in the manner urged by petitioner. As noted by the Eighth Circuit in *United States* v. *Marvin*, *supra*, 687 F.2d at 1225, referring to *United States* v. *Marshall*, 683 F.2d 1212 (8th Cir., 1982), "both sides agreed that knowledge of unlawful acquisition had to be proved by the government."

The term "knowingly" has no function to play in the statute if, as found by the court below, it is limited to the verbs in the sentence and their objects, "coupons," and "authorization cards." Under this "general intent" reading urged by the court below, one would be assuming that Congress specifically inserted the word "knowingly" to prevent the prosecution of sleepwalkers, or those who thought they were dealing in baseball cards. The most casual perusal of the U.S. Code, however, demonstrates that Congress has not felt it necessary to employ the word "knowingly" for the limited purpose of preventing such prosecutions. One need look no further than the succeeding companion provision, Section 2024(c). Here, the verbs are not preceded by the word "knowingly," but no one would suggest that Congress thereby authorized the prosecution of persons who did not know that they were presenting coupons for payment or redemption. The only logical purpose of the word "knowingly" in subsection (b) is the same as that which is plainly evident in subsection (c), to encompass not only the verbs and their objects, but also the attendant circumstance element, namely that the acquisition, etc., is "in any manner not authorized by this chapter."

The court below also based its argument on the different position of the word "knowingly" in subsection (c). It argued that the different placement of the word "is evidence that Congress 'knew how to place the word . . . in such a way as to require unambiguously that a person know that he is acting contrary to law.' " 735 F.2d at 1047. The Eighth Circuit correctly rejected this argument as "too weak a reed to support the argument that Congress intended to displace a time honored principle of criminal jurisprudence." *United States* v. *Marvin*, *supra*, 687 F.2d at 1226. The most natural explanation for the difference in position is that "knowingly" is not intended to modify merely the verbs and their objects, and that "knowing the same to have been received . . . in any manner in violation of the provisions of this chapter" in subsection (c) is the functional equivalent of "knowingly . . . acquires . . . coupons . . . in any manner not authorized by this chapter" in subsection (b). Congress "knew how" to require knowledge of the attendant circumstances and it did so, in both subsections.

Two things should be emphasized about Sec. 2024(c) which support petitioner's reading of the preceeding section. First, there is no doubt that under this section the government must prove that a defendant had knowledge that receipt of food stamps was in a manner which violated the statute. *United States* v. *Miller*, 543 F.2d 1221, 1223 (8th Cir. 1976). Second, this section applies only to participants in the Food Stamp Program, since it deals with the presenting of coupons for redemption. Thus, as pointed out by the Eighth Circuit in *United States* v. *Marvin*, *supra*, the government's assertion that subsection (b) is a strict liability provision, while subsection (c) is not, "would make it easier to convict an ordinary citizen . . . for buying food stamps, than someone in the

grocery business who would have some reason to be familiar with the regulations . . ." 687 F.2d at 1226.

It is also significant that the statute involved in this case is one of a class of similarly worded statutes, generally found outside Title 18 of the United States Code. These statutes do not undertake to define specific criminal acts, but instead act as "catch-all" penalty provisions covering numerous things done in violation of a referenced statutory scheme. The difference between these statutes and the specific-description type of statute was cogently stated by Judge Magruder in his concurring opinion in *St. Johnsbury Trucking Co.* v. *United States*, 220 F.2d 393, 398 (1st Cir. 1955), as follows:

> If a statute provides that it shall be an offense "knowingly" to sell adulterated milk, the offense is complete if the defendant sells what he knows to be adulterated milk, even though he does not know of the existence of the criminal statute, on the time-honored principle of the criminal law that ignorance of the law is no excuse. But where a statute provides, as does 18 U.S.C. Sec. 835, that whoever knowingly violates a regulation of the Interstate Commerce Commission shall be guilty of an offense, it would seem that a person could not knowingly violate a regulation unless he knows of the terms of the regulation and knows that what he is doing is contrary to the regulation.[1]

It is significant that courts, in interpreting this "catch-all" type of criminal provision, have interpreted the words "knowingly" or "willfully" to require the government to prove knowledge that the underlying statutory or regulatory scheme was being violated.

[1] The precise holding of *St. Johnsbury Trucking Co.* was overruled in *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558 (1971) on the ground that the statute and regulations were in a class dealing with "dangerous or deleterious devices or products or obnoxious waste materials," so that "the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." 402 U.S. at 565.

United States v. *Powell*, 423 U.S. 87 (1975) involved a statute which punished "whoever knowingly deposits for mailing . . . any pistol, revolver, or firearm declared nonmailable by this section . . ." 18 U.S.C. Sec. 1715. A preceding paragraph of this Section declared that "pistols, revolvers, and other firearms capable of being concealed on the person" are nonmailable. The issue in the case concerned whether the phrase "capable of being concealed on the person" rendered the statute unconstitutionally vague. It is significant, however, to note that if the statute had been read in the manner contended for by the government here, the defendant would have only had to know that she was depositing for mailing a firearm, and the issue of her knowledge whether the firearm was nonmailable by virtue of being "capable of being concealed on the person" would never have arisen. All parties in the *Powell* case apparently assumed that the adverb "knowingly" modified the entire phrase "deposits for mailing . . . any pistol, revolver or firearm declared nonmailable by this section." It is exactly this reading which petitioner is urging in this case.[2]

[2] Petitioner's reading draws further support from this Court's observation last term in *United States* v. *Yermian*, 104 Sup.Ct. 2936, 2940 (1984), that the meaning of the statute there under consideration would be different if the phrase at issue were not placed at the beginning of the sentence, but were placed in a phrase after the adverb, implying that the statute would have been read differently if it were phrased "knowingly made in a matter within Federal agency jurisdiction." See also *United States* v. *Bass*, 404 U.S. 336 (1971), where this Court read a statute containing three verbs followed by the clause "in commerce or affecting commerce," so that the clause modified all three verbs, and not just the adjacent verb. This Court stated, "since 'in commerce or affecting commerce' undeniably applies to at least one antecedent, and since it makes sense with all

In *United States* v. *Johnson & Towers, Inc.*, 741 F.2d 662 (3rd Cir. 1984), the Court interpreted a statute which read as follows:

> [a]ny person who—. . .
>
> (2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either—
>
> (A) without having obtained a permit under section 6925 of this title . . . or
>
> (B) in knowing violation of any material condition or requirement of such permit.

42 U.S.C. Sec. 6928(d). As in this case, the government contended that the word "knowingly" applied only to the words "treats, stores, or disposes," and that it did not have to prove that the defendant knew either that the waste was hazardous or that there was no permit. This argument was rejected by the Court of Appeals on the following three grounds, which are equally applicable to this case: First, the court observed that "if the word 'knowingly' in section 6928(d)(2) referred exclusively to the acts of treating, storing or disposing, as the government contends, it would be an almost meaningless addition since it is not likely that one would treat, store or dispose of waste without knowledge of that action." 741 F.2d at 668. Second, the court pointed to the use of the word "knowingly" in subsection (B) and pointed out the anomaly of requiring knowledge of the requirements in a case where a defendant had obtained a permit, but providing for strict liability in a case where no permit had been obtained. 741 F.2d at 668. Finally, the court, comparing the statute before it with the food stamp stat-

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three, the more plausible construction here is that it, in fact, applies to all three." (404 U.S. at 339-400). The same reasoning applies to this statute with regard to terms and phrases immediately following the term "knowingly."

ute at issue in this case, observed: "As a matter of syntax, we find it no more awkward to read 'knowingly' as applying to the entire sentence than to read it as modifying only 'treats, stores, or disposes.'" 741 F.2d at 668. The court concluded that under this statute the trial judge should instruct the jury that it must find that each defendant knew that the Company was required to have a permit, and knew that they did not have a permit. 741 F.2d at 669.

United States v. *Figurell*, 462 F.2d 1080 (3rd Cir. 1972) involved a statute that punished "any person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . ." 50 U.S.C. App., Sec. 462. The defendant was prosecuted for failing to inform his draft board that his wife and children were no longer living with him, in violation of regulations. The Court of Appeals reversed his conviction because there was insufficient evidence that he knew that he had a duty to so report this fact.

United States v. *Dye Construction Co.*, 510 F.2d 78 (10th Cir. 1975), involved a statute which punished "any employer who willfully violates any standard, rule, or order promulgated pursuant to Section 655 of this Title, or of any regulations prescribed pursuant to this chapter . . ." 29 U.S.C. Sec. 666(e). The instruction to the jury, approved by the Court of Appeals, stated: "The failure to comply with a safety standard under the Occupational Safety And Health Act is willful if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement." 510 F.2d at 81.

United States v. *Simpson*, 561 F.2d 53 (7th Cir. 1977), involved a statute which punished "any person who willfully and knowingly does . . . any act, matter, or

thing, in this chapter prohibited . . ." 47 U.S.C. Sec. 501. The court reversed the conviction because "there is no evidence that Simpson had actual knowledge of the regulations." The court observed:

> "We think it cannot be said that a reasonable man would be aware that he was forbidden to broadcast with a CB transmitter which had been purchased by him, was licensed to his former wife at their joint home, and remained there with the license still in effect after she left their home . . . This is not a situation in which the actor should know from the nature of the prohibited act that it was likely to create danger or produce deleterious results . . ."

561 F.2d at 62.

In *United States* v. *Granda*, 565 F.2d 922 (5th Cir. 1978), which concerned the defendant's failure to file a report when bringing more than $5,000 in currency into the Country, the court interpreted a statute which punished "whoever willfully violates any provision of this chapter or any regulation under this chapter . . ." 31 U.S.C. Sec. 1058. The underlying statute required the filing of a report by anyone who "knowingly" transported funds exceeding $5,000. 31 U.S.C. Sec. 1101. The Court of Appeals held that "the terms 'knowing' and 'willful' require proof of the defendant's knowledge of the reporting requirement and his specific intent to commit the crime. Congress, by adding these terms, took this regulatory statute out of the ranks of strict liability type crimes." 565 F.2d at 925-926.

The above cases demonstrate that when dealing with statutes in the form of 7 U.S.C. Sec. 2024(b), which reference entire statutory and regulatory schemes, the most natural reading is to interpret the term "knowingly" or "willfully" as requiring knowledge that the provisions of the underlying statutes and regulations are being

violated. Among other things, this is a natural reading, because strict liability under such a broad criminal statute would otherwise raise issues of unconstitutional vagueness. See *United States* v. *Marvin*, *supra*, 687 F.2d at 1228, *United States* v. *Salazar*, 720 F.2d 1482, 1485 (10th Cir. 1983).

It is important to point out that petitioner is *not* contending that the Government must prove knowledge of complex regulations, nor that a prosecution under this statute requires a broad "specific intent" instruction, such as that offered by petitioner at the trial. Petitioner contends merely that the statute itself contains the necessary definition of intent, that a defendant "knowingly . . . acquires . . . coupons . . . in any manner not authorized by this chapter . . ." 7 U.S.C. Sec. 2024(b).[3] Thus, the government need only prove that a defendant knew his acquisition of food stamps was in a manner not authorized by law.

In essence, petitioner asks that the Court recognize that the statute in question contains both a "nature of conduct" element and an "attendant circumstances" element, as those terms are used in the ALI Model Penal Code, "one source of guidance upon which the Court has relied to illuminate questions of this type." *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 444. See generally, *United States* v. *Bailey*, 444 U.S. 394, 403-407 (1980). Thus, the mental element "knowingly" applies both to the "nature of the conduct" (acquiring coupons)

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[3] Thus, the commentary to the Model Penal Code states, "It should be noted that the general principle that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense." ALI, Model Penal Code, Tentative Draft No. 4 (1955), Comments, p. 131.

and the "attendant circumstances" (that the acquiring is in a manner not authorized by the statute).

With regard to the "attendant circumstances" element of the offense, the statute requires no more than proof of "knowingly" as defined in the Model Penal Code, Sec. 2.02(2)(b)(i) ". . . he is aware . . . that such circumstances exist." It should be noted that the definitions of culpability contained in Sec. 2.02 of the Model Penal Code have been widely adopted by the states. According to one recent commentator, this section "has exerted a major influence on criminal law reform in all but two of the 38 jurisdictions where reform has occurred. Section 2.02 may appropriately be considered the representative modern American culpability scheme." Robinson & Grall, "Element Analysis In Defining Criminal Liability: The Model Penal Code And Beyond." 35 Stan.L.Rev. 681, 691-692 (April 1983).[4]

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[4] Petitioner adequately preserved his contention at trial. The court below criticized petitioner's submission of a "boilerplate specific intent instruction." 735 F.2d at 1048. Petitioner does not disagree with the position that this time-honored instruction is not required when other instructions cover the required mental state with greater precision. However, because the statute involved here itself contained as an element the circumstance that the acquisition was "in any manner not authorized by this chapter," the language of the pattern instruction, that the jury must find "that the defendant knowingly did an act which the law forbids, purposely intending to violate the law," was not wildly inaccurate, and in the absence of a more precise instruction, should have been given. It should be born in mind that the indictment in this case contained the term "willfully" and that the Government's position that this was not a specific intent crime came as a surprise at the end of the trial. Petitioner's counsel, therefore, had no time to formulate a more precise instruction. Furthermore, the tendered instruction and the argument pertaining to it served to focus the issue and elicit from the judge the ruling, "I believe that he must knowingly purchase. He has to know what he is purchasing, this

It should also be pointed out that the rules of construction contained in Section 2.02 of the Model Penal Code are useful in interpreting the statute involved in this case. Thus, petitioner contends that this is a statute where the culpability term does not distinguish between the elements of the offense. In such a situation, the Model Penal Code provides that "such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears." Section 2.02(4). The commentary on this provision states, "The draft proceeds on the view that if a particular kind of culpability has been articulated at all by the legislature, as sufficient with respect to any element of the offense, the normal probability is that it was designed to apply to all material elements." ALI, Model Penal Code, Tentative Draft No. 4 (1955), Comments, p. 129.

Further, even if one were to agree with the government that "knowingly" modifies only the "nature of conduct" element, and not the "attendant circumstances" element, then the latter element has no stated culpability term. In such a situation, Section 2.02(3) is brought into play, which provides "When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly, or recklessly with respect thereto." Even if "recklessly" were adopted as the appropriate standard of culpability under such an analysis, it

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is not a specific intent offense. It's contraband, and that's it. He knows that he's purchasing it." (J.A. 31.) This, together with the Court's instruction that counsel could not argue ignorance of the law (J.A. 31-32), sufficiently preserved for appeal the contention that the jury should have been instructed that it must find that defendant was aware that his acquisition of food stamps was "in any manner not authorized by" the law.

would still require proof by the government considerably beyond the "strict liability" standard applied in the court below.

II. At The Least, There Is An Ambiguity As To What Elements Of The Offense The Word "Knowingly" Modifies, And This Court Should Therefore Apply The Rule of Lenity.

The court below did not purport to base its holding on anything in the legislative history of the statute. The legislative history was canvassed by the Eighth Circuit and the Tenth Circuit, but nothing useful was found. *United States* v. *Marvin*, *supra*; *United States* v. *O'Brien*, 686 F.2d 850 (10th Cir. 1982). Therefore, if the statute is found to be ambiguous, this Court must rely upon rules of construction.

If the Court disagrees with petitioner's argument presented above that the statute is most naturally read with the word "knowingly" modifying the phrase "in any manner not authorized by this chapter," it is at least apparent that the statute is ambiguous on this point. As pointed out by the Tenth Circuit, "it is not clear how far down the sentence the word 'knowingly' is intended to travel," and, "the statute can be read either way." *United States* v. *O'Brien*, *supra*, 686 F.2d at 852. That court pointed to the following passage in LaFave and Scott, *Criminal Law*, Sec. 27 (1972), analyzing the inherent ambiguity of statutory language of this type:

> "Still further difficulty arises from the ambiguity which frequently exists concerning what the words or phrases in question modify. What, for instance, does "knowingly" modify in a sentence from a "blue sky" law criminal statute punishing one who "knowingly sells a security without a permit" from the securities commissioner? To be guilty must the seller of a security without a permit know only that what he is doing constitutes a sale, or must he also know that the thing he sells is a security, or must he also know that he has no permit to sell the security he sells? As a matter of grammar the statute is ambiguous; it is not at all clear how far down the sentence the word "knowingly" is intended to travel—whether it modifies "sells," or "sells a security," or "sells a security without a permit."

That the structure of the sentence does not eliminate ambiguity is further indicated by the fact that in *United States* v. *Yermian*, 104 S.Ct. 2936 (1984), where the disputed phrase came before the word "knowingly" in the sentence, four members of this Court agreed with the Court of Appeals that "it is quite impossible to tell which phrases the terms 'knowingly' and 'willfully' modify." 104 S.Ct. at 2944 (dissenting opinion).

Since the statute is at the least ambiguous, this Court should follow the principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 437; *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *United States* v. *Bass*, 404 U.S. 336, 347 (1971). As stated by Justice Frankfurter in a frequently quoted passage, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." *United States* v. *Universal CIT Credit Corp.*, 344 U.S. 218, 221-222 (1952); *Williams* v. *United States*, 458 U.S. 279, 290 (1982); *Ladner* v. *United States*, 358 U.S. 169, 177-178 (1958).

III. This Court Should Not Infer That Congress Intended Strict Liability For A Felony Punishable By A Jail Term.

The government's reading of the statute contends that Congress specified no mental state regarding the element of the offense defining the "attendant circumstance" that the acquiring of the coupons was in a manner not authorized by law. It is well settled, however, that the mere omission of a term defining the requisite mental state does not mean that Congress intended strict liability as to that element. As stated by this Court in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438 (1978), "certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." *United States* v. *Bailey*, 444 U.S. 394, 406 n.6 (1980); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

The statute in this case provides for up to five years imprisonment. This Court should, therefore, apply the presumption against strict liability where prison terms are called for. As pointed out in *United States* v. *Bailey*, *supra*, p. 404, n.4: "Under the Model Penal Code, the only offenses based on strict liability are "violations," actions punishable by a fine, forfeiture, or other civil penalty rather than imprisonment." This principle was recently reaffirmed by this Court in *United States* v. *United States Gypsum, Co.*, 438 U.S. 422 (1978). Quoting often-cited language by Justice Jackson in *Morissette* v. *United States*, *supra*, this Court stated that "while strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements . . . the limited circumstances in which Congress has created and this Court has recognized such offenses . . . attest to their generally disfavored status." 438 U.S. at 437-438.

The policy expressed in the Model Penal Code Section 2.05(2)(a) that strict liability not be imposed under any statute calling for a prison term, is undoubtedly a wise one, expressing a fundamentally felt policy. As stated in Sayre, "Public Welfare Offenses," 33 Colum. L.Rev. 55, 72 (1933); "To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure. Crimes punishable with prison sentences, therefore, ordinarily require proof of a guilty intent." This Court in *Morissette* v. *United States*, *supra*, in describing what has come to be known as "public welfare offenses," remarked that "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." 342 U.S. at 256.

The Eighth Circuit, in interpreting the statute at issue in this case (in a case in which the defendant had in fact been sentenced to five years imprisonment), stated:

> "The normal purpose of the criminal law is to condemn and punish conduct that society regards as immoral. Usually the stigma of criminal conviction is not visited upon citizens who are not morally to blame because they did not know they were doing wrong. If Congress wishes to depart from that norm, it may do so, but in general it must manifest its intention by 'affirmative instruction.' "

United States v. *Marvin*, *supra*, 687 F.2d at 1226. See also, *United States* v. *O'Brien*, *supra*, 686 F.2d at 853.

As stated by the Second Circuit Court of Appeals in requiring an intent to violate the law under a statute punishing the failure of narcotics addicts to register upon entering and leaving the country:

> The primary purpose of law, and the criminal law in particular, is to conform conduct to the norms ex-

> pressed in that law. When there is no knowledge of the law's provisions, and no reasonable probability that knowledge might be obtained, no useful end is served by prosecuting the "violators." Since they could not know better, we can hardly expect that they should have been deterred. Similarly, it is difficult to justify application of criminal punishment on other traditional grounds such as retribution, rehabilitation or disablement. Without knowledge, the moral force of retribution is entirely spent; we do not rehabilitate conduct that is by hypothesis not faulty; and there is little to recommend incarcerating those who would obey the law if only they knew of its existence.

United States v. *Mancuso*, 420 F.2d 556, 559 (2nd Cir. 1970). See the commentary on Sec. 2.05 describing it as "a frontal attack on absolute or strict liability in penal law, whenever the offense carries a possibility of sentence of imprisonment." ALI, Model Penal Code, Tentative Draft No. 4 (1955), Comments, p. 140. See also, Weinreb, Comment, Working Papers of the National Commission on Reform of Federal Criminal Laws (1970), pp. 129-130. The proposed "Declaration of Policy" contained in the Official Comment to Sec. 1006 of the Study Draft of a New Criminal Code reads as follows:

> *Declaration of Policy.* The great increase of statutory and administrative regulation commanding affirmative acts or forbidding behavior not condemned by generally recognized ethical standards emphasizes the need for discrimination in the use of the criminal law to enforce such regulation. Use of penal sanctions to enforce regulation involves substantial risk that a person may be subjected to conviction, disgrace, and punishment although he did not know that his conduct was wrongful. When penal sanctions are employed for regulatory offenses, considerations with respect to fair treatment of human beings, as well as the substantive aims of the regulatory statute, must enter into legislative, judicial, and administrative decisions with regard to sanctions. It is the policy of the United States to prefer non-penal sanctions over penal sanctions to secure compliance with regulatory law unless violation of regulation manifests disregard for the welfare of others or of the authority of government. It is further the policy of the United States that no purely regulatory offense shall be punishable as a felony.

The National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code (1970), p. 70.

The provisions of the Model Penal Code have been widely adopted by the states. For example, see *People* v. *Valley Steel Products Co.*, 71 Ill.2d 408, 375 N.E.2d 1297 (1978), where the Illinois Supreme Court applied that State's version of Section 2.05 to find that a statute providing for a penalty of imprisonment was not an absolute liability offense.

There are, to be sure, certain "limited circumstances" in which this Court has recognized the existence of strict liability felonies. *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 437. One such class of cases has been described by this Court as cases "where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, [and] the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 564-565 (1971).

The other group of such cases involve an element of an offense which merely serves to define federal jurisdiction. *United States* v. *Yermian*, 104 S.Ct. 2936 (1984); *United States* v. *Feola*, 420 U.S. 671 (1975).

This case clearly does not involve a clause which merely defines federal jurisdiction, nor does it involve a commodity which is in itself so dangerous to society that strict liability is necessary. Especially when dealing with a statute which, as here, is applied to persons outside the regulatory scheme sought to be enforced, it simply cannot be contended that defendants are persons "standing in responsible relation to a public danger" such as to merit strict liability prosecution. *Morissette* v. *United States*, *supra*, 342 U.S. at 260.

IV. Because Of The Broad Nature Of The Statute, And The Large Size Of The Food Stamp Program, A Rule Of Strict Liability Could Bring Results Which Could Not Have Been Intended By Congress.

In weighing whether or not to accept a broad reading of a criminal statute urged by the Government, this Court has frequently examined how wide a range of activities would be brought within the prohibition, and whether such a result could be reasonably attributed to Congress. *Williams* v. *United States*, 458 U.S. 279, 286-287 (1982); *Ladner* v. *United States*, 358 U.S. 169, 176 (1958); *Rewis* v. *United States*, 401 U.S. 808, 811-812 (1971). Such an analysis is certainly appropriate in this case. See *United States* v. *Marvin*, *supra*, 687 F.2d at 1227.

A 1982 Congressional report noted that there were 240,000 retail outlets participating in the Food Stamp Program. Of 4,729 investigations of such outlets conducted in 1981, over 50% produced evidence of violations. Senate Report No. 97-504 on the Omnibus Budget Reconciliation Act of 1982, P.L. 97-253, reported at 1982 U.S. Code Congressional & Administrative News 1641, 1700-1701. The statute, of course, is not limited to these retail outlets, nor is it limited to the millions of persons who are food stamp recipients, but is applicable to the

entire population, no matter what their connection to the Food Stamp Program. Further, the statute is not limited to "trafficking" or other specific types of activity. Although literally millions of people "acquire" food stamp coupons every year, any of them are subject to prosecution if the acquisition is "in any manner not authorized by this chapter."

Further, the government has not limited prosecutions under this Act to instances of "trafficking." In *United States* v. *Smith*, 572 F.2d 1089 (5th Cir. 1978), for example, a store owner was indicted for accepting food stamps after having been disqualified from the program. In *United States* v. *Ward*, 575 F.Supp. 159 (E.D. N.C. 1983), a food stamp recipient was indicted under this statute for failure to report all of her income.

The potential impact of strict liability under this statute is revealed by the briefest perusal of the food stamp law as a whole, let alone the regulations promulgated thereunder. As just one example, 7 U.S.C., Sec. 2012(i), defining which groups of persons are entitled to a "household" allotment of food stamps contains, the following provision:

> . . . Notwithstanding clause (1) of the preceding sentence, an individual who lives with others, who is sixty years of age or older, and who is unable to purchase food and prepare meals because such individual suffers, as certified by a licensed physician, from a disability which would be considered a permanent disability under section 221(i) of the Social Security Act (42 U.S.C. 421(i)) or from a severe, permanent, and disabling physical or mental infirmity which is not symptomatic of a disease shall be considered, together with any of the others who is the spouse of such individual, an individual household, without regard to the purchase of food and preparation of meals, if the income (as determined under

section 2014(d) of this title) of the others, excluding the spouse, does not exceed the poverty line, as described in section 2014(c)(1) of this title, by more than 65 per centum.

If such a person should obtain a "household" allotment of food stamps and it were to be found that he did not meet this definition, he would have "acquired" his food stamps in a "manner not authorized by this chapter."

V. Strict Liability Is Not Necessary Because Of The Government's Policy Of Giving Extensive Notice And Warnings.

The overriding irony of the government's argument for strict liability under this statute is that retail food stores, who would be the natural targets of "trafficking" investigations because of their ability to redeem food stamps through their banks, receive extensive notice and warnings. This means both that knowledge is not difficult to prove in the trial of store owners, and that strict liability would have the effect of making enforcement of the statute harsher on non-participants, such as petitioner, than it is on participants.

The compliance program for retail food stores was described at trial by William Pryor, a supervisor for the Food and Nutrition Service of the Department of Agriculture. This compliance program is also described in *United States* v. *Marshall*, 683 F.2d 1212, 1214-1215 (8th Cir. 1982). Pryor explained that the retail food stores are authorized by FNS to take food stamps only after an on-site inspection. At this initial visit, a form is used which sets forth the various things to be gone over with the owner. The various requirements of the food stamp program are covered at that time. When a store is accepted into the program, they receive a pamphlet containing the food stamp regulations. Subsequent visits to the store by FNS officers are of two types: educational

visits and compliance visits. The volume of redemptions is monitored, which may trigger a visit by an officer to the store. Visits by officers are often followed up by a letter to the store owner. In the compliance visits and followup letters, the requirements of the food stamp program are explained. Prior to referring a store to the compliance branch, Pryor's department initially attempts to correct the situation. The compliance branch conducts its own investigation, and then refers appropriate cases to the Inspector General for prosecution. (J.A. 6-10).

It is on the wholesalers and retailers certified to deal in food stamps that a rational enforcement program would be focused. As noted by one Congressional committee, ". . . the only way to profit substantially from engaging in trafficking is to have access to the redemption process through relationship to a grocery store coupled with access to large volumes of discounted or free food stamps . . . [the Office of Inspector General's] focus on major wholesaler and retailer food stamp abuse rather than upon individual discounting transactions is the most appropriate way, therefore, to reduce food stamp fraud." House Report No. 96-788 (Agriculture Committee), on the Food Stamp Act Amendments of 1980, PL 96-249, February 27, 1980, reported in 1980 U.S. Code Congressional & Administrative News, 843, 953.

Because of this compliance program, it is obvious that the Government does not need strict liability in order to enforce the law against its primary targets.

The Governments espousal of strict liability has arisen in connection with another type of enforcement activity under the statute—the enticing by undercover agents and informers of ordinary citizens who have no connection with the Food Stamp Program. Illustrative is the career of Kansas City Police Department informer Jackie Clark.

United States v. *Marvin, supra,* (8th Cir. 1982); *United States* v. *O'Brien, supra,* (10th Cir. 1982); *United States* v. *Faltico,* 687 F.2d 273 (8th Cir. 1982). "An experienced criminal defendant, Clark had previously pleaded guilty to three armed-robbery charges and was facing revocation of parole when he became employed by law-enforcement agencies." He was "instructed to offer food stamps for sale at discount prices to any receptive parties he might find." 687 F.2d at 274. He eventually made cases on some 60 persons, 687 F.2d at 1224, including a long-time friend (O'Brien), his chiropractor (Marvin), and a lawyer (Faltico). Similarly, in *United States* v. *Biswell,* 700 F.2d 1310 (10th Cir. 1983), undercover agents approached the defendant, the owner of a pawn shop and used car lot, on the recommendation of local police who felt that he was "a fence and malcontent." 700 F.2d at 1315. In *United States* v. *Salazar,* 720 F.2d 1482 (10th Cir. 1983), defendant was approached by undercover agents because he was the patron of a bar which had been identified by local police as "a site of possible food stamp trafficking." 720 F.2d at 1483.

The government thus seeks to impose strict liability on persons who have no duty or incentive to be familiar with the food stamp regulations, while on the other hand, because of its extensive compliance program, it does not need strict liability in order to prosecute members of the regulated class. As noted by the Eighth Circuit, "the government's reading of the statute would make it easier to convict an ordinary citizen, like Dr. Marvin, for buying food stamps, than someone in the grocery business who would have some reason to be familiar with the regulations governing redemption of stamps for cash in an authorized fashion." *United States* v. *Marvin, supra,* 687 F.2d at 1226.

The enforcement policy issues in the prosecution of persons outside the Food Stamp Program were well summed up by the trial judge below in addressing the defendant at his sentencing:

> "But I want you to know that I feel badly about the fact that you have been prosecuted. I think it would have been quite enough in this case for somebody to have shown up in Mr. Liparota's restaurant one day, and taken him and his brother in the back room and said, 'Look, you guys, we know you bought some food stamps. Now, cut it out.'
>
> And to crank up the machinery of Government and to impose it upon these two men literally the twilight of their life, I just—I just do not understand it." (J.A. 35).

Addressing this same issue under a different regulatory statute, Justice Stewart, in his dissenting opinion in *United States* v. *International Minerals & Chemical Corp.,* 402 U.S. 558, 569 (1971), stated:

> "Likewise, prosecution of regular shippers for violations of the regulations could hardly be impeded by the 'knowingly' requirement, for triers of fact would have no difficulty whatever in inferring knowledge on the part of those whose business it is to know, despite their protestations to the contrary. The only real impact of this decision will be upon the casual shipper, who might be any man, woman, or child in the Nation. A person who had never heard of the regulation might make a single shipment of an article covered by it in the course of a lifetime. It would be wholly natural for him to assume that he could deliver the article to the common carrier and depend upon the carrier to see that it was properly labeled and that the shipping papers were in order. Yet, today's decision holds that a person who does just that is guilty of a criminal offense punishable by a year in prison. This seems to me a perversion of the purpose of criminal law."

CONCLUSION

Over twenty years ago, Professor Herbert Packer concluded an analysis of this Court's opinions dealing with criminal intent by stating:

> No one should be sentenced to imprisonment or its equivalent without being afforded the opportunity to litigate the issue of *mens rea* or, to use the term adopted by the framers of the Model Penal Code, culpability. No criminal statute should be construed as depriving such a defendant of that opportunity in the absence of the plainest kind of indication that the legislature meant to do so. In the field of federal criminal law, it seems likely that an adequately formulated interpretative presumption should solve the problem. *Morissette* should be generalized and the view taken that no criminal statute should be construed to dispense with blameworthiness (whether through traditional *mens rea* or through its extension to include negligence) merely because it does not contain language explicitly imposing that requirement. Rather, *mens rea* or its equivalent should be required unless a legislative purpose to dispense with it plainly appears.

Packer, *"Mens Rea and the Supreme Court," 1962 Supreme Court Review 107*, 150-151. The principle advocated by Professor Packer is the same as that adopted by this Court in *United States* v. *United States Gypsum Co.*, *supra*. That principle should be reaffirmed in this case.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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No. 84-5108

In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANK LIPAROTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether in a prosecution under 7 U.S.C. 2024(b) the government must prove that the defendant knew that his actions were not authorized by law.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is reported at 735 F.2d 1044.

JURISDICTION

The judgment of the court of appeals (J.A. 45) was entered on June 4, 1984. The petition for a writ of certiorari was filed on July 23, 1984, and was granted on October 29, 1984 (J.A. 46). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

7 U.S.C. 2024(b) and (c) provide:

(b) Unauthorized use, transfer, acquisition, alteration, or possession of coupons or authorization cards; restitution by convicted individuals

(1) Subject to the provisions of paragraph (2) of this subsection, whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons or authorization cards are of a value of $100 or more, be guilty of a felony and shall, upon the first conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than six months nor more than five years and may also be fined not more than $10,000 or, if such coupons or authorization cards are of a value of less than $100, shall be guilty of a misdemeanor, and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and upon the second and any subsequent conviction thereof, shall be imprisoned for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

(2) In the case of any individual convicted of an offense under paragraph (1) of this subsection, the court may permit such individual to perform work approved by the court for the purpose of providing restitution for losses incurred by the United States and the State agency as a result of the offense for which such individual was convicted. If the court permits such individual to perform such work and such individual agrees thereto, the court shall withhold the imposition of the sentence on the condition that such individual perform the assigned work. Upon successful completion of the assigned work the court may suspend such sentence.

(c) Presentation for payment or redemption of coupons that have been illegally received, transferred, or used

Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty of a felony and, upon the first conviction thereof, shall be fined not more than $10,000 or imprisoned for not more than five years, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned for not less than one year nor more than five years and may also be fined not more than $10,000, or, if such coupons are of a value of less than $100, shall be guilty of a misdemeanor and, upon the first conviction thereof, shall be fined not more than $1,000 or imprisoned for not more than one year, or both, and, upon the second and any subsequent conviction thereof, shall be imprisoned

for not more than one year and may also be fined not more than $1,000. In addition to such penalties, any person convicted of a felony or misdemeanor violation under this subsection may be suspended by the court from participation in the food stamp program for an additional period of up to eighteen months consecutive to that period of suspension mandated by section 2015(b)(1) of this title.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of three counts of acquiring food stamps in a manner not authorized by law, in violation of 7 U.S.C. 2024(b) (Pet. App. 1). He was sentenced to three hours' imprisonment, the sentence to be considered served (Pet. App. 3).

1. The Food Stamp Act of 1977 (the Act) Tit. XIII, 7 U.S.C. 2011-2029, is a federal program designed to "alleviate * * * hunger and malnutrition" by "permit[ing] low-income households to obtain a more nutritious diet through normal channels of trade" (7 U.S.C. 2011). To this end, food stamp coupons are issued through the mail or over the counter by a participating state agency (see 7 C.F.R. 274.1, 274.3) to eligible low income households. 7 U.S.C. 2013(a), 2014, 2015. The value of the coupons allocated to each household is calculated to permit the recipients to obtain a low-cost, nutritious diet. 7 U.S.C. 2017, 2012(o). The coupons—which are not transferable—may be used by the recipients only to purchase certain types of food for home consumption (7 U.S.C. 2013(a), 2012(g)) from approved food stores. 7 U.S.C. 2018. Participating grocers, in turn, may redeem the coupons for cash. 7 U.S.C. 2019. Coupons ultimately are redeemed for full face value by the United States. 7 U.S.C. 2013(a). Both recipients and food stores may be disqualified from participation in the food stamp program for failure to comply with a variety of the Act's requirements. 7 U.S.C. 2015, 2021.

The Act also contains criminal penalty provisions. 7 U.S.C. 2024(b)(1) provides that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by this chapter or the regulations issued pursuant to this chapter" commits a criminal act[1]; that act is a misdemeanor if the value of the coupons involved is less than $100, and a felony if it exceeds $100. In either case, individuals convicted under Section 2024(b)(1) may be given an opportunity to "perform work approved by the court for the purpose of providing restitution for losses incurred * * * as a result of the offense for which such individual was convicted." In such a case, the sentence may be suspended. 7 U.S.C. 2024(b)(2).

Section 2024(b)'s companion provision, 7 U.S.C. 2024(c), addresses the redemption of food stamp coupons by grocers. It provides that "[w]hoever presents, or causes to be presented, coupons for payment or redemption * * * knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this chapter or the regulations issued pursuant to this chapter, shall be guilty" of a criminal act.

2. The evidence at trial showed that petitioner and his brother owned a restaurant that was not authorized to participate in the food stamp program (Pet.

[1] Authorization cards, which are issued by participating state agencies to eligible households, show the allotment of coupons that the household is entitled to receive. 7 U.S.C. 2012(b); 7 C.F.R. 271.2.

App. 2).[2] In March 1982, an agent of the Department of Agriculture received a tip that she might be able to sell food stamps at the restaurant (Pet. App. 2). She therefore visited the restaurant and approached petitioner, offering to sell him $195 worth of food stamp coupons. Petitioner agreed to purchase the coupons for $150, and petitioner's brother paid the agent that sum in exchange for the coupons. A similar transaction, involving petitioner's purchase for $350 of food stamp coupons having a face value of $500, was completed one week later. Pet. App. 2. Petitioner subsequently purchased another $500 set of stamps for $300 (*ibid.*); at that time, he offered to "hustle" food stamp coupons for the agent (J.A. 19).

Petitioner was indicted on three counts of violating 7 U.S.C. 2024(b).[3] When the case was submitted the trial judge instructed the jury that "the word 'knowingly' is used in these instructions [to] mean[] that the Defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake, or accident" (J.A. 33). The judge then charged that the government bore the burden of proving that "the defendant knowingly and wilfully acquired food stamps" (4/6/83 Tr. 251). But the judge rejected petitioner's request that he give an instruction on "specific intent" (see J.A. 34), thus declining to charge the jury that petitioner could be convicted only if he knowingly violated the law.

On appeal, petitioner contended that the district court erred in failing to instruct the jury on "specific

[2] In unusual circumstances, restaurants may participate in the program by contracting with administering state agencies to provide meals to the elderly (see J.A. 6-7). Petitioner's restaurant had not done so.

[3] Petitioner's brother, who was named in the first two counts of the indictment (J.A. 2-3), pleaded guilty. Pet. 3.

intent." The court of appeals disagreed, ruling that "§ 2024(b) clearly states that only a finding of general intent is necessary to sustain a conviction" (Pet. App. 5).[4]

The court arrived at its holding by comparing the placement of the word "knowingly" in Section 2024(b) ("whoever knowingly • • • uses • • • coupons • • • in any manner not authorized by this chapter") with the placement of the word "knowing" in 7 U.S.C. 2024(c) ("[w]hoever presents • • • coupons for payment or redemption • • • knowing the same to have been received • • • in violation of the provisions of this chapter"). In the latter provision, the court of appeals noted, "knowing" precedes and therefore plainly modifies the requirement that the coupons be used "in violation of" law. In Section 2024(b), in contrast, "knowingly" precedes the verbs "uses, transfers, acquires, alters or possesses." Given this difference between the provisions, the court of appeals reasoned that Congress must *not* have intended that the word "knowingly" in Section 2024(b) apply to the requirement that the stamps be transferred or acquired "in a manner not authorized by this chapter." The court therefore concluded that, "[i]n view of the fact that Congress knew precisely how to create a specific intent offense, and did so in

[4] Petitioner did not argue before the court of appeals that Section 2024(b) is a specific intent crime; he instead contended that the trial judge should have given a specific intent instruction because the indictment alleged that petitioner acted "willfully" (Pet. App. 5). The court of appeals rejected this contention (Pet. App. 6-7). It was the government that brought to the court's attention decisions by other courts of appeals that found a specific intent requirement in Section 2024(b) (see note 5, *infra*), leading to the Seventh Circuit's analysis of the provision.

the provision immediately following the section at issue here * * * section 2024(b) cannot be characterized as ambiguous. It must be held that Congress intended to require only proof of general intent." Pet. App. 6.[8]

SUMMARY OF ARGUMENT

A. The language, structure and legislative history of Section 2024(b) make it plain that knowing violation of the law is not an element of the offense created by the statute. The provision does not in terms make knowledge of illegality a prerequisite for conviction: it uses the word "knowingly" to condition a series of verbs, which have as their object the terms "coupons" and "authorization cards." The verbs are then again conditioned by the phrase "in any manner not authorized by [law]." As the Court held last year in construing a virtually identical statute, "[t]he most natural reading" of a provision in this form does not apply the "knowingly" to the "in any manner" phrase. *United States* v. *Yermian*, No. 83-346 (June 27, 1984), slip op. 6 n.6. So construed, the term "knowingly" saves the statute from imposing strict liability by insuring that the defendant was aware of the nature of his actions, while at the same time making it unnecessary for the government to prove the defendant's familiarity with all of the provisions of the Act and its implementing regulations.

[8] The court of appeals therefore rejected holdings by the Eighth and Tenth Circuits to the effect that "section 2024(b) requires a finding of specific intent" (Pet. App. 5). See *United States* v. *Marvin*, 687 F.2d 1221 (8th Cir. 1982), cert. denied, 460 U.S. 1081 (1983); *United States* v. *O'Brien*, 686 F.2d 850 (10th Cir. 1982). See also *United States* v. *Pollard*, 724 F.2d 1438, 1438-1439 (6th Cir. 1984). The opinion below was circulated to the full Seventh Circuit; only one judge favored rehearing en banc to resolve the apparent conflict with the decisions of the Eighth and Tenth Circuits (Pet. App. 1 n.*).

This reading of Section 2024(b) draws added support from the structure of the statute. In Section 2024(b)'s companion provision, 7 U.S.C. 2024(c), Congress provided that "[w]hoever presents * * * coupons for payment or redemption * * * knowing the same to have been received * * * in any manner in violation of the provisions of this chapter" commits a criminal act. In contrast to Section 2024(b), Section 2024(c) explicitly makes liability hinge on knowledge of illegality. Given Congress's creation of such an offense in the provision immediately following the one at issue here, the sharply contrasting placement of "knowingly" in Section 2024(b) must be seen as intentional. *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981). This difference between the two provisions is a sensible one: as it is written, Section 2024(c) spares grocers (the persons who present coupons for redemption) from being held strictly liable under the criminal provisions of the Act for the fraud of their customers, or held liable under a respondeat superior theory for the misbehavior of their employees. In contrast, only a wrongdoer himself can perform the acts at which Section 2024(b) is directed.

The legislative history confirms that Congress intentionally chose to give Sections 2024(b) and (c) differing structures. Congress repeatedly summarized the two provisions in one sentence, thus emphasizing their differences. H.R. Rep. 1228, 88th Cong., 2d Sess. 16 (1964); S. Rep. 1124, 88th Cong., 2d Sess. 18 (1964); H.R. Rep. 95-464, 95th Cong., 1st Sess. 376 (1977). Indeed, the House Report pointedly omitted any mention of knowing illegality in describing Section 2024(b), explaining that the provision reaches "*any* unauthorized use" of food stamps; in contrast,

it added that "under [Section 2024(c)] * * * the same penalties are prescribed for whoever presents * * * food stamps (for payment or redemption) *knowing* that they have been" used illegally. H.R. Rep. 95-464, *supra*, at 376 (emphasis added).

B. The legislative purpose also suggests that knowing illegality is not an element of a Section 2024(b) offense. The Act and the regulations issued under it erect an extraordinarily detailed system of controls designed to permit the use of food stamps only by those in need, and only for purposes relating to the improvement of nutrition. Thus, the Act creates stringent eligibility requirements, provides for the allocation only of enough coupons to support a "minimum cost adequate diet" (H.R. Rep. 95-464, *supra*, at 8), closely controls program administration, and makes use of unusually strict penalties.

These provisions demonstrate that the program is designed to allocate with some precision the necessary number of coupons—and only that number—to those in need of nutritional assistance. Almost by definition, then, any diversion of coupons will detract from the nutritional aid available to needy households. In these circumstances, the Seventh Circuit's interpretation of Section 2024(b) is sensitive to the congressional interest in preserving the integrity of the program, while recognizing that the evils against which the provision is aimed include not only fraudulent or culpable conduct but also any actions that might chip away at the efficacy of "the most effective social program in aid of the poor today." H.R. Rep. 97-106, 97th Cong., 1st Sess. 52 (1981).

C. The Seventh Circuit's decision also is consistent with the role played by penal regulatory statutes. It is true, of course, that common law crimes generally were directed at inherently blameworthy conduct, and

therefore were read to punish only persons with an "evil-meaning mind." *Morissette* v. *United States*, 342 U.S. 246, 251 (1952). But this Court consistently has recognized the legitimacy of "public welfare offenses" in which "penalties serve as an effective means of regulation." *United States* v. *Dotterweich*, 320 U.S. 277, 280-281 (1943). In considering these types of provisions—which are aimed at preventing regulatory injury rather than at punishing blameworthy conduct, and which generally operate in areas where regulation should be anticipated—a culpability or scienter requirement has no useful application.

Section 2024(b) plainly shares the significant characteristics of these provisions. It is not derived from a common law offense. It is aimed at actions that, whatever their blameworthiness, will both injure the treasury and detract from the effectiveness of a significant federal program. And the existence of criminal penalties under the Act should not take anyone by surprise: the detailed restrictions placed upon the use of coupons certainly suggests that they should not be trafficked in lightly; program administrators make extraordinary efforts to educate participants about the Act's requirements; and most members of the public surely are aware that the aim of the program is "to furnish resources to the poor to enable them to survive" (H.R. Rep. 96-788, 96th Cong., 2d Sess. 13 (1980)), rather than to create a novel form of legal tender that can be traded at will.

ARGUMENT

PROOF THAT A DEFENDANT KNEW HE WAS ACTING ILLEGALLY IS NOT REQUIRED UNDER 7 U.S.C. 2024(b)

The court of appeals in this case held that familiarity with the provisions of the Act and its implementing regulations is not an element of the offense defined by 7 U.S.C. 2024(b); it therefore upheld petitioner's conviction despite his argument that he was unaware that he had acquired food stamp coupons in a "manner not authorized" by law. This conclusion was correct. Section 2024(b) does not in terms make knowing violation of the law a prerequisite to conviction, and the statute's structure and legislative history confirm that Congress acted intentionally in omitting such a requirement from the provision. Indeed, Section 2024(b) is written—as are many similar statutes in analogous areas—to most efficaciously safeguard the integrity of a public welfare program. In these circumstances, the decision below simply heeded this Court's admonition that "courts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense." *United States* v. *Bailey*, 444 U.S. 394, 406 (1980).

A. The Language, Structure, And Legislative History Of Section 2024(b) Indicate That The Government Need Not Prove The Defendant Knew His Conduct Was Illegal

1. There is no doubt that a defendant may be convicted under Section 2024(b) only if the government is able to establish that he used, transferred, acquired, altered or possessed food stamp coupons or authorization cards in a manner that is not authorized by law. The government also must prove that

the defendant "knowingly" committed these acts—that is, that he knew that the documents he handled were federal food stamp coupons or authorization cards.

It is equally plain, however, that the language of Section 2024(b) does not, on its face, require the government to prove that the defendant was aware of the *illegality* of his actions. The provision uses the adverb "knowingly" to condition a series of verbs: "uses, transfers, acquires, alters or possesses." The statute then describes food stamp coupons and authorization cards as the objects of those verbs. Finally, each of the verbs is again modified by the requirement that the action described be taken "in a manner not authorized by [law]." Thus, the "in any manner" element of the offense "appears in a phrase separate from the prohibited conduct modified by the term[] 'knowingly * * *.'" *United States* v. *Yermian*, No. 83-346 (June 27, 1984), slip op. 6. Because "'the question of the kind of culpability required [must] * * * be faced separately with respect to each material element of the crime" (*Bailey*, 444 U.S. at 406, quoting Model Penal Code § 2.02 comment 123 (Tent. Draft No. 4, 1955)), there is no reason to suppose that "knowingly" was used to condition the "in any manner" phrase as well as the terms describing the prohibited activity. "Any natural reading" (*Yermian*, slip op. 6) of the statute must therefore associate "knowingly" only with the latter words.

Indeed, the Court reached an identical conclusion last term while addressing a statute that is phrased identically to Section 2024(b). In *Yermian*, the Court considered the meaning of the 1934 predecessor to 18 U.S.C. 1001 (Act of June 18, 1934, ch. 587,

48 Stat. 996 *et seq.*), which provided that "whoever shall knowingly and willfully . . . make . . . any false or fraudulent statements * * * in any matter within the jurisdiction of any department or agency of the United States" commits a crime. The Court noted that the "in any matter" phrase—which directly parallels Section 2024(b)'s "in any manner" term—"appeared as a separate phrase at the end of the description of the prohibited conduct * * *." *Yermian*, slip op. 6 n.6. The Court therefore had little difficulty concluding from "[t]he structure of the statutory language" that "[t]he most natural reading of this version of the statute * * * establishes that 'knowingly and willfully' applies only to the making of false or fraudulent statements" and not to the "in any matter" element of the offense. *Yermian*, slip op. 6 n.6.[6]

[6] *Yermian* is far from unique: both this Court and the courts of appeals consistently have given a similar reading to similarly worded statutes. See, *e.g.*, *United States* v. *Feola*, 420 U.S. 671, 687 (1975) (under its "natural reading," 18 U.S.C. 371—which makes it a crime to "conspire * * * to commit any offense against the United States"—does not require the government to prove that the defendant was aware that he was conspiring to commit a federal crime); *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 563 (1971) (18 U.S.C. 834(a)) (repealed 1979), which subjects "whoever knowingly violates any [Interstate Commerce Commission (ICC)] regulation" to criminal penalties, does not require knowledge of the applicable ICC regulation); *United States* v. *Bankston*, 603 F.2d 528, 532 (5th Cir. 1979) (construing 18 U.S.C. 1201); *United States* v. *Napier*, 518 F.2d 316, 319 (4th Cir. 1975) (same); *United States* v. *Howey*, 427 F.2d 1017, 1018 (9th Cir. 1970) (construing 18 U.S.C. 641). Cf. Note 13, *infra*.

Nothing in the language of Section 2024(b) suggests that the Court should reach a different result here.[7]

Despite petitioner's assertions to the contrary (Br. 8), the Seventh Circuit's reading of the term "knowingly" leaves it with a significant role to play in the statute. It prevents Section 2024(b) from imposing "strict or absolute liability," by insuring that the defendant was aware of the nature both of his actions and of the coupons that he acquired or used. *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558, 560 (1971). See *United States* v. *Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring in the judgment). This restricts liability to those persons who knowingly engaged in activities that Congress sought to condemn, while giving persons who have contact with food stamps an opportunity to discover and conform their conduct to the law's requirements.[8] Cf. *United States* v. *Bass*, 404 U.S. 336, 348 n.15 (1971).

Indeed, it is petitioner's approach to Section 2024(b) that fails to recognize the full import of the statutory language. He would require the government to prove that a defendant knew that his actions

[7] While petitioner correctly notes (Br. 23) that the "in any matter" phrase addressed in *Yermian* involved a jurisdictional element of the offense, the Court ultimately based its holding not on that factor but on congressional intent as "ma[d]e clear" in the "statutory language." *Yermian*, slip op. 5. See *id.* at 6 & n.6.

[8] Petitioner plainly is incorrect in asserting (Br. 8) that Congress has not used the word "knowingly" to indicate that the defendant must be aware of the nature of his actions. See generally *Freed*, 401 U.S. at 612-616 (Brennan, J., concurring in the judgment). This is, of course, the very meaning given the word in the Model Penal Code, upon which petitioner relies extensively. § 2.02(2)(b)(i) (Proposed Official Draft 1962).

were "not authorized by [7 U.S.C. 2011-2029] or the regulations issued pursuant to [7 U.S.C. 2011-2029]." As the statute is written, such a requirement presumably would force the government to establish beyond a reasonable doubt a defendant's familiarity with the provisions of the Act and its implementing regulations. Given the likelihood of self-serving testimony (see, *e.g.*, J.A. 30), petitioner's reading would in many instances make it impossible to prosecute individuals who are not participants in the food stamp program—even those who, like petitioner, have engaged in acts that any reasonable person must realize to be of suspect propriety—because the government will be unable to prove that the defendant *knew* that no statutory or regulatory provision authorized his actions.[9]

In short, nothing in the statutory language invites the Court to give the statute anything other than its most straightforward reading. Had Congress wished to make knowledge of illegality an element of the Section 2024(b) offense, it easily could have done so. It might, for example, have drafted the statute to begin with the words "whoever, with intent to defraud the United States"; or it might have provided that "whoever uses, transfers, acquires, alters or possesses coupons in a manner that he knows not to be authorized by law" commits an offense. Indeed, Congress regularly uses just these formulations when

[9] Petitioner denies that his contention would require the government to prove "knowledge of complex regulations" (Br. 15). But it is difficult to see how the prosecution could establish "that a defendant knew his acquisition of food stamps was in a manner not authorized by law" (Br. 15) without proving that the defendant was familiar with the provisions setting forth the authorized methods for acquiring and using coupons.

making the legality of the acquisition or possession of a certain type of property turn on either culpable intent or knowledge of the property's legal status.[10] And when Congress has wanted to make ignorance of the existence of a statute or regulation a defense to a charge of violating the provision, it has not hesitated to do so explicitly. See, *e.g.*, 15 U.S.C. 79z-3, 80a-48. Its failure to make use of either of these drafting devices here is a powerful indication that knowledge of illegality is not an element of the Section 2024(b) offense.

2. While the statutory text thus supports the Seventh Circuit's conclusion, the court of appeals' holding draws strength from more than the bare language of Section 2024(b); this is not a case where the court simply "point[ed] to the [assertedly] ambiguous phrases and proclaim[ed] them clear." *Yermian*, slip op. 3 (Rehnquist, J., dissenting). Instead, the court properly concluded that the meaning of the statute can be illuminated by an examination of the provision's companion, 7 U.S.C. 2024(c). In that provision, Congress made use of the formula discussed above, providing that "[w]hoever presents * * * coupons for payment or redemption * * * knowing the same to have been received * * * in any manner in violation of the provisions of this chapter" commits a criminal act.[11] In contrast to Section 2024(b), Sec-

[10] For statutes involving the placement of "knowing," see, *e.g.*, 18 U.S.C. 331, 485, 494, 498, 500, 641, 659, 2113(c), 2312, 2313, 2314. For references to fraudulent intent, see, *e.g.*, 18 U.S.C. 472, 477, 478, 479, 480, 483, 500.

[11] While conviction under Section 2024(c) requires proof of the defendant's knowledge that the coupons at issue had been used in a manner not authorized by law, that requirement—in contrast to the parallel one proposed by petitioner for Section

tion 2024(c) explicitly makes liability hinge on knowledge of illegality.

In using this statutory structure, Congress "demonstrated that it knew how to provide [that knowledge of illegality was required for conviction] when it wished to do so elsewhere in the very 'legislation cited.'" *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981), quoting *Galloway* v. *United States*, 319 U.S. 372, 389 (1943). "Under traditional principles of statutory construction," the difference between Sections 2024(b) and (c) accordingly must be seen as intentional. *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981). See *Lawrence County* v. *Lead Deadwood School District*, No. 83-240 (Jan. 9, 1985), slip op. 10; *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982). As a result, the court of appeals correctly reasoned that "section 2024(b) cannot be characterized as ambiguous" (Pet. App. 6).

Congress's decision to give the two provisions differing structures was a sensible one. Unless Section 2024(c) requires proof that the defendant knew the coupons at issue to have been used or obtained improperly, a grocer who attempts to redeem coupons might not only be strictly liable for the fraud of his customer, but also criminally liable under a respondeat superior theory for the misbehavior of his employees. Cf. *Wolf* v. *United States*, 662 F.2d 676, 677-678 (10th Cir. 1981) (store may be disqualified administratively under 7 U.S.C. 2021 on a respondeat

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2024(b)—will not serve as an insuperable obstacle to prosecution. The Department goes to great lengths to ensure that grocers (who are the persons that present coupons for redemption) are familiar with the requirements of the Act. See page 32, *supra*; J.A. 7-9. Demonstrating their knowledge of program requirements in prosecutions under Section 2024(c) therefore should not present undue difficulties.

superior theory); *J.C.B. Super Markets, Inc.* v. *United States*, 530 F.2d 1119, 1121-1122 (2d Cir. 1976) (same). In contrast, only a wrongdoer himself can perform the acts at which Section 2024(b) is directed—that is, using, transferring, acquiring, possessing or altering food stamp coupons in an unauthorized way. And petitioner is incorrect in suggesting (Br. 9-10) that this statutory structure makes it easier to convict nonparticipants in the food stamp program than grocers who presumably are familiar with the requirements of the Act, since grocers—as well as all other participants in the program—may be prosecuted under Section 2024(b) for improper acquisition or use of food stamp coupons. See, *e.g.*, *United States* v. *Cash*, 486 F.2d 295, 296 (5th Cir. 1973).

3. Finally, the legislative history of the provision confirms that Congress intentionally placed the "knowingly" in Section 2024(b) so that it would not condition the "in any manner not authorized by [law]" phrase. When the predecessors to Section 2024(b) and (c) were first enacted (in a form identical in all relevant respects to the current versions) as part of the Food Stamp Act of 1964, 7 U.S.C. (1964 ed.) 2023(b) and (c), Congress emphasized the differing structures of the two subsections by describing them in one sentence: "[t]his section makes it a violation of Federal law to knowingly use, transfer, acquire, or possess coupons in any manner not authorized by this act or to present, or cause to be presented, such coupons for redemption knowing them to have been received, transferred or used in any manner in violation of the provisions of the act." H.R. Rep. 1228, 88th Cong., 2d Sess. 16 (1964). See S. Rep. 1124, 88th Cong., 2d Sess. 18 (1964). At the

time, Congress also observed that the criminal provisions generally imposed penalties "for misuse of coupons." H.R. Rep. 1228, *supra*, at 14.

The legislative history of the 1977 Act is more explicit.[19] Again, Congress highlighted the structure of the provision by describing Section 2024(b) and (c) in one sentence. H.R. Rep. 95-464, 95th Cong., 1st Sess. 376 (1977). The House Report then omitted any mention of knowing illegality in explaining that "[*a*]*ny unauthorized* use, transfer, acquisition, alteration, or possession of food stamps * * * by any individual * * * may be prosecuted under the provisions of" Section 2024(b). "Moreover," the Report then continued, "under [section 2024(c)] * * * the same penalties are prescribed for whoever presents or causes to be presented food stamps (for payment or redemption) *knowing* that they have been received, transferred or used in any manner violating the provisions of the Act or regulations implementing the Act." H.R. Rep. 95-464, *supra*, at 376 (emphasis added). This legislative history, which demonstrates both that the difference between Sections 2024(b) and 2024(c) was plainly visible to Congress and that Congress was fully aware of the scope of the former provision, is entirely ignored by petitioner.

In short, the statutory text and legislative history "unambiguously dispense[] with an actual knowledge requirement." *Yermian*, slip op. 6 n.7.[18] In these circumstances, neither the rule of lenity nor any of the other canons of construction urged upon the Court by petitioner (see Br. 15-24) "'require[s] magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language.'" *Williams* v. *United States*, 458 U.S. 279, 303 (1982) (Marshall, J., dissenting), quoting *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948). See *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Similarly, "[p]rinciples derived from common law as well as precepts suggested by the American Law Institute must bow" to the clear congressional intent. *Bailey*, 444 U.S. at 406.

[19] In 1977 Congress significantly revised the food stamp program that had been created in 1964. It therefore superseded the Food Stamp Act of 1964, 7 U.S.C. (1964 ed.) 2011 *et seq.*, with the 1977 Act. See Section 1303 of the Food and Agriculture Act of 1977, Pub. L. No. 95-113, 91 Stat. 979.

[18] The cases cited by petitioner in support of his proposed construction (Br. 11-14) do not detract from this conclusion: none involved the combination of statutory language, structure and legislative history that give Section 2024(b) its clarity.

B. Interpreting Section 2024(b) To Require Proof Of Knowing Illegality Would Be Inconsistent With The Purposes Of The Act

The Food Stamp Act of 1977 was intended "[t]o alleviate * * * hunger and malnutrition" by "permit[ing] low-income households to obtain a more nutritious diet." 7 U.S.C. 2011. See H.R. Rep. 97-106, 97th Cong., 1st Sess. 50-52, 443 (1981); H.R. Rep. 96-788, 96th Cong., 2d Sess. 12-13 (1980); H.R. Rep. 1228, *supra*, at 5, 12; S. Rep. 1124, *supra*, at 1. To guarantee that this purpose is fulfilled to the fullest extent possible, the Act and the regulations issued under it by the Department of Agriculture erect an extraordinarily detailed system of restrictions and controls designed to permit the use of food stamp coupons only by those in need, and only for purposes relating to the improvement of nutrition. These restrictions are augmented by a series of administra-

tive and criminal penalty provisions, of which Section 2024(b) is a part.

Viewed in this context, Section 2024(b) must be seen as accomplishing more than the punishment of acts that are "culpable" in themselves, or the prevention fraud against the federal treasury; in addition, the Section is one of a long list of provisions that serve to discourage *any* diversion of coupons from use for the beneficial purposes intended by the food stamp program. In this setting, the omission of a knowing illegality element from Section 2024(b) is far from anomalous. To the contrary, the Seventh Circuit's interpretation of the provision is entirely consistent with the statutory aims.

1. Food stamps may be issued only to individuals "whose incomes and other financial resources * * * are determined to be a substantial limiting factor in permitting them to obtain a more nutritious diet." 7 U.S.C. 2014(a). See 7 U.S.C. 2016(a). Eligibility therefore is limited to families below or near the poverty line (see 7 U.S.C. 2014(c)), and both the Act and its implementing regulations establish elaborate income (see 7 U.S.C. 2014(d)-(j); 7 C.F.R. 273.1(b), 273.7-273.9), reporting (see 7 U.S.C. 2015(c); 7 C.F.R. 273.12), and work (see 7 U.S.C. 2015(d), (e)) requirements for recipients. See generally H.R. Rep. 97-106, *supra*, at 50-51; H.R. Rep. 1228, *supra*, at 2-3; S. Rep. 1124, *supra*, at 10-11. Similarly, the number of coupons allocated to each household is carefully calculated to permit the recipients to obtain "a minimum cost adequate diet." H.R. Rep. 95-464, *supra*, at 8. See 7 U.S.C. 2017; H.R. Rep. 97-106, *supra*, at 41; S. Rep. 1124, *supra*, at 1, 9, 11-12, 14-15. These coupons may be used to purchase only certain types of food for home consumption: tobacco

products, alcoholic beverages, medicinal items, vitamins and mineral supplements, animal foods, nonfood groceries and food preparation equipment may not be purchased. See 7 U.S.C. 2012(g); H.R. Rep. 95-464, *supra*, at 324-325.

The administration of the program also is strictly controlled. Among many other requirements (see generally 7 C.F.R. Pts. 274-275), recipients may obtain coupons only by mail (see 7 C.F.R. 274.3) or by presenting an identification card; in some areas, a photo identification card is required. 7 C.F.R. 273.10(g)(3)(ii). The social security number of each member of a recipient household must be provided to the administering agency. 7 C.F.R. 273.6. To prevent even the possibility of fraud or manipulation, as a general matter the same state employee cannot both certify a recipient household as eligible to participate in the program and issue coupons to that household. 7 C.F.R. 272.4(c). Strict requirements relating to the processing and verification of applications, issuance of coupons, administration of the program, and reporting are imposed on participating state agencies. See 7 C.F.R. 272.1-272.2, 273.2, 274.1, 275.1-275.23. Reporting requirements also are mandated for the entities that issue coupons and for participating food stores. 7 U.S.C. 2016(d), 2018(c). Indeed, only certain stores are eligible even to apply to participate in the food stamp program (7 U.S.C. 2018(a)), and those that apply may be approved only after an examination of, among other things, their "business integrity and reputation." 7 U.S.C. 2018(a)(3); 7 C.F.R. 278.1(b)(3).

Completing the controls that forestall the diversion of coupons from their intended use are a set of unusually strict penalty provisions. States are expressly made strictly liable to the Secretary for virtually all

losses that occur during the acceptance, storage and issuance of coupons. 7 U.S.C. 2016(f); see 7 C.F.R. 274.3, 274.8, 276.2(b), 278.5. It is a criminal offense—for which any entity issuing coupons, or any of its officers, employees or agents, may be held strictly liable—for a coupon issuer to fail to provide its required monthly reports to the Department of Agriculture, or otherwise fail to comply with the requirements of 7 C.F.R. Pt. 274. 7 C.F.R. 271.5(d)(1).[14] Provision is made for the administrative recovery of overpayments made to recipients who benefitted either from inadvertent error or from an intentional violation of the program's requirements (7 C.F.R. 273.18(a)); individuals who intentionally violate program rules also may be disqualified from participation in the program (7 U.S.C. 2015; 7 C.F.R. 273.16),[15] as may stores that fail to comply with applicable requirements. 7 U.S.C. 2021; 7 C.F.R. 278.6.

[14] Coupon issuers are subjected to greater penalties for knowingly providing false information in the required reports. 7 C.F.R. 271.5(d)(2).

[15] Noting that Section 2015(b) provides for administrative disqualification from the program only for intentional violations, the Tenth Circuit concluded that a knowing illegality element should be read into Section 2024(b) to keep that provision from reaching a broader range of conduct than does Section 2015(b). *United States* v. *O'Brien*, 686 F.2d 850, 853 & n.9 (10th Cir. 1982). But this analysis ignores the differing language, purposes and legislative history of the provisions. As originally enacted in 1977, the language of Section 2015(b) differed dramatically from that used by Congress in that same year to provide for criminal penalties in Section 2024(b). Section 2015(b) provided that a person would be ineligible to participate in the food stamp program for a stated period for having "fraudulently" used coupons, or for having used them in a "fraudulent" manner. § 1301, 91 Stat. 964. The legislative history confirms that the provision was aimed at individuals who "fraudulently, i.e. knowingly and with deceitful intent," used coupons. H.R. Rep. 95-464, *supra*, at 154. In contrast, of course, Section 2024(b) makes no mention of fraud, and its legislative history indicates that it reaches "any unauthorized use" of coupons. H.R. Rep. 95-464, *supra*, at 376. This simultaneous use of different language cannot be seen as accidental. See, *e.g.*, *Lehmcn* v. *Nakshian*, 453 U.S. 156, 162 (1981); *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981). That Congress used different standards in the two provisions is hardly surprising: Section 2015(b) is concerned principally with sanctions imposed on a large scale by state administrative agencies, rather than with criminal penalties meted out by the federal courts. See H.R. Rep. 95-464, *supra*, at 155; H.R. Rep. 96-788, *supra*, at 114-115.

Section 2015(b) was put in its present form in 1981, when the existing administrative penalties for fraud were "extended" to misrepresentation. S. Rep. 97-139, 97th Cong., 1st Sess. 35 (1981). The statute was then seen to be directed against "fraud and misrepresentation" (*id.* at 66), as well as against violations of state laws relating to food stamps (*id.* at 65). Again, the emphasis was on state enforcement (see *ibid.*). And, again, the language used differs significantly from that found in Section 2024(b): Section 2015(b) now disqualifies persons who have "intentionally (A) made a false or misleading statement * * *, or (B) committed any act that constitutes a violation of this chapter, the regulations issued thereunder, or any State statute, for the purpose of" using coupons. 7 U.S.C. 2015(b)(1). In contrast, Congress at no time has indicated that it intended to narrow the focus of Section 2024(b) to conform the reach of that provision to the reach of Section 2015(b).

In these circumstances, the Tenth Circuit erred in striving to read as identical statutes that plainly are quite different. Indeed, even under the Tenth Circuit's (and petitioner's) reading of Section 2024(b), that provision will reach more conduct than does Section 2015(b), for the word "knowingly" is broader than are the terms "intentionally" and "pur-

2. These provisions demonstrate that the food stamp program makes an attempt to allocate with some precision the necessary number of coupons—

and only that number—to those in need of nutritional assistance. Almost by definition, then, any diversion of coupons will detract from the nutritional aid available to, or taken advantage of by, needy households. The drafters of the Act plainly recognized this, explaining that criminal penalties were provided even for seemingly trivial misuses of coupons—"for someone using some of the stamps for a haircut or a shave or gasoline or whatever." *Food Stamp Act of 1964: Hearings on H.R. 10222 Before the Senate Comm. on Agriculture and Forestry*, 88th Cong., 2d Sess. 33 (1964) (colloquy between Sen. Talmadge and Secretary Freeman).

Given this background, it is hardly surprising that, as the statutory and regulatory provisions outlined above also make clear, preserving the integrity of the program was a central congressional concern. Doing so is necessary if the Act's beneficial purposes are to be achieved. And preventing the diversion of coupons from their intended use is crucial to the program for another reason as well: the perception that food stamps, for whatever reason, often are devoted to a purpose other than the improvement of nutrition will be fatal to the public confidence that is essential for the success of the Act. See H.R. Rep. 97-106, *supra*, at 53; H.R. Rep. 96-788, *supra*, at 12-13.

In these circumstances, it is evident that "the program's worthy purpose can easily be thwarted by

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pose[ly]." For example, a food stamp recipient who is given a coupon as a gift has acquired it in a manner that he knows not to be authorized by law, and therefore is (even under petitioner's reading) subject to prosecution under Section 2024(b). It is hardly clear, however, that he has "intentionally * * * committed any act * * * for the purpose of acquiring" coupons.

fraud or even a level of a much lesser degree of noncompliance, and that punitive sanctions are necessary for enforcement." *Badwan* v. *United States*, 541 F.2d 1388, 1390 (10th Cir. 1976). Interpretation of the Act's provisions therefore must be sensitive to the drafters' intention that "applicants and recipients alike constantly * * * be aware that Congress does not and will not tolerate" avoidance of the Act's requirements. H.R. Rep. 97-106, *supra*, at 52; see H.R. Rep. 96-788, *supra*, at 13. The decision below fosters such an awareness (cf. *United States* v. *Bass*, 404 U.S. 336, 348 n.15 (1971)) and protects the integrity of the program. Equally as important, it recognizes —as petitioner's proposed reading does not—that the evil against which Section 2024(b) is aimed is not so much culpable or fraudulent conduct as actions of any sort that chip away at the efficacy of "the most effective social program in aid of the poor in operation today." H.R. Rep. 97-106, *supra*, at 52. See generally *United States* v. *Dotterweich*, 320 U.S. 277, 280-281 (1943).[16]

C. The Omission Of A Knowledge Of Illegality Requirement From Section 2024(b) Is Consistent With The Role Played By Penal Regulatory Statutes

Although the language, structure and purposes of the statute suggest that knowledge of illegality is not

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[16] Petitioner is incorrect in suggesting that *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), indicated that Section 2024(b) is concerned only with "fraud" (Br. 7-8). In the course of holding that Section 3(e) of the Food Stamp Act of 1964, 7 U.S.C. (1976 ed.) 2012(e), was not necessary to combat fraud, the Court in *Moreno* noted that the predecessor to Section 2024(b) "impose[d] strict criminal penalties upon any individual who obtains or uses food stamps fraudulently." 413 U.S. at 536. But the Court never suggested —and had no occasion to address the question whether—the provision also reached nonfraudulent activity.

an element of a Section 2024(b) offense, petitioner urges the Court to apply a "presumption" to find such an element and therefore forestall the imposition of "strict liability" (Br. 20). This suggestion misapprehends the nature of Section 2024(b) and misstates the role played by culpability and knowledge requirements in criminal law. In fact, the decision below is entirely consistent with this Court's rulings on the place of the mental element in regulatory offenses.

1. It is true, as Justice Jackson wrote for the Court in *Morissette* v. *United States*, 342 U.S. 246, 251 (1952), that at common law "[c]rime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand." Yet the Court in *Morissette* was forced to reconcile this notion with two other undeniably valid concepts: "the ancient maxim that 'ignorance of the law is no excuse' " (*Freed*, 401 U.S. at 612 (Brennan, J., concurring in the judgment)), and the doctrine that mens rea need not be found "where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes, as in cases of *mala in se*." *United States* v. *Balint*, 258 U.S. 250, 252 (1922).

The Court's answer to the problem posed by these competing principles was its conclusion that crimes "taken over from common law" generally should be read to punish only those "blameworthy in mind." *Morissette*, 342 U.S. at 252. See *id.* at 263. At the same time, however, the Court recognized and endorsed the existence of a category of " 'public welfare offenses' " (*id.* at 255) with no common law analogue that "depend on no mental element but consist only of forbidden acts or omissions" (*id.* at 252-253). Such crimes, the Court explained, "may be regarded

as offenses against [the state's] authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted." *Id.* at 256. See *id.* at 259-260. See generally *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 437 (1978); *United States* v. *Fernandez*, 497 F.2d 730, 744 (Hufstedler, J., concurring).

Thus, as petitioner grudgingly concedes (Br. 23), this Court and the lower courts, both before and after *Morissette*, repeatedly have upheld examples of the "now familiar type of legislation whereby penalties serve as effective means of regulation." *Dotterweich*, 320 U.S. at 280-281. These include statutes that, like Section 2024(b), simply dispense with a knowledge of illegality element, as well as true strict liability statutes that provide criminal penalties for engaging in certain types of conduct even though the actor is unaware of the nature of his actions. Generally speaking, the omission of a culpability element has been found appropriate when the provision at issue was a "statute of prohibition rather than of punishment" (*Holdridge* v. *United States*, 282 F.2d 302, 310 (8th Cir. 1960) (Blackmun, J.)), aimed not so much at penalizing blameworthy conduct as at preventing regulatory injury. And such enactments have been deemed fair because they tend to operate in areas either where regulation should be anticipated (see *International Minerals*, 402 U.S. at 564-565; *Freed*, 401 U.S. at 607) or where "[t]he accused * * * is in a position to prevent [the violation] with no more care than society might reasonably expect." *Morissette*, 342 U.S. at 256. In these circumstances, a culpability or scienter requirement—which traditionally has served to distinguish blameworthy from innocent conduct—has no useful application.

With these principles in mind, the courts have found that lawmakers appropriately dispensed with a "culpability element" in a wide range of enactments. Among them are revenue provisions, see *Balint*, 258 U.S. at 252-253 (interpreting the Narcotic Act of 1914, ch. 1, § 2, 38 Stat. 786)[17]; provisions involving the prescription (*United States* v. *Behrman*, 258 U.S. 280, 288 (1922) (interpreting the Narcotic Act of 1914, ch. 1, § *2*, 38 Stat. 786)) and transportation (*Dotterweich*, 320 U.S. at 278, interpreting 21 U.S.C. 331(a)) of drugs; provisions prohibiting re-entry onto a military reservation (*Holdridge*, 282 F.2d at 310 (Blackmun, J.) (interpreting 18 U.S.C. 1382)); provisions involving the shooting of migratory birds (*United States* v. *Catlett*, 747 F.2d 1102, 1104 (6th Cir. 1984) (interpreting 16 U.S.C. 703 and 50 C.F.R. 20.1)); provisions involving the grazing of livestock on federal land (*United States* v. *Larson*, 746 F.2d 455, 456 (8th Cir. 1984) (interpreting 16 U.S.C. 551 and 36 C.F.R. 261.7)); provisions involving the cutting of timber in a national (*United States* v. *Wilson*, 438 F.2d 525, 525-526 (9th Cir. 1971), interpreting 16 U.S.C. 551 and 36 C.F.R. 261.6(a)) or state (*Shevlin-Carpenter Co.* v. *Minnesota*, 218 U.S. 57, 62 (1910)) forest; provisions involving the transportation of corrosive materials (*International Minerals*, 402 U.S. at 563-565, interpreting 18 U.S.C. 834(a));

[17] The Narcotic Act was characterized by the Court as "a taxing act, with the incidental purpose of minimizing the spread of addiction." 258 U.S. at 253. The Court therefore based its holding in part on the observation that "in the collection of taxes the importance to the public of their collection leads the legislature to impose on the taxpayer the burden of finding out the facts upon which his liability to pay depends, and meeting it at the peril of punishment." *Id.* at 252.

provisions involving the registration or making of firearms (*Freed*, 401 U.S. at 607; *Sipes* v. *United States*, 321 F.2d 174, 179 (8th Cir. 1963) (Blackmun, J.) (interpreting 26 U.S.C. 5821 and 5861)); and provisions involving the possession of a gun by a person with a prior felony conviction (*United States* v. *Horton*, 503 F.2d 810, 813 (7th Cir. 1974), interpreting 18 U.S.C. App. 1202(a)(1)).[18]

Section 2024(b) shares the significant characteristics of these regulatory provisions. It is not, of course, derived from a common law offense. The actions at which it is aimed, whatever their inherent "blameworthiness," will both injure the treasury and detract from the effectiveness of a significant federal program. And the existence of criminal penalties under the Act should not take anyone by surprise: the extraordinary restrictions, outlined above, placed on the manner in which coupons may be obtained and used certainly suggests that they should not be distributed or trafficked in lightly. Indeed, Congress and the Department of Agriculture have taken pains to

[18] This Court has found the omission of a culpability element permissible while interpreting statutes that made provision for felony as well as misdemeanor and petty offense convictions. See, *e.g.*, § 9, 38 Stat. 789 (at issue in *Balint* and *Behrman*); *Shevlin-Carpenter*, 218 U.S. at 62 n.1; 26 U.S.C. 5871 (at issue in *Freed*). In any event, to the extent that the severity of the punishment bears on the degree of culpability required for conviction (see *Holdridge*, 282 F.2d at 310 (Blackmun, J.)), it is worth noting that transactions involving stamps worth less than $100—which presumably includes most trivial and "nonculpable" offenses—are punishable only as misdemeanors. And the sentence for any Section 2024(b) conviction may be suspended in favor of a court-approved work program. This suggests that criminal intent "may properly be omitted as an element of the offense." *Holdridge*, 282 F.2d at 310 (Blackmun, J.).

ensure that everyone with a legitimate reason to come into contact with the program is aware of the restrictions on the use of coupons. Thus, state administrators must explain the Act's requirements to all recipients (7 U.S.C. 2020(e)(2); 7 C.F.R. 272.5(b)(2)), participating food stores repeatedly are made familiar with those requirements (see J.A. 7-8), and stores must even "display a sign providing information on how persons may report abuses they have observed in the operation of the food stamp program." 7 U.S.C. 2018(e). In these circumstances, "the standard [of behavior] imposed is * * * reasonable and adherence thereto properly expected of a person." *Holdridge*, 282 F.2d at 310 (Blackmun, J.).

In short, there is nothing extraordinary about Congress's decision to omit a knowledge of illegality element from Section 2024(b), and no "presumption" operating in favor of its creation.[19] To the contrary, the application of a presumption excusing those who are ignorant of the law would run squarely counter to the traditional approach to the notion of scienter.[20]

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[19] As the Court noted in *Morissette*, "Congressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already * * * well defined in common law * * * may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act." 342 U.S. at 262.

[20] "In general, two closely related but distinguishable notions are involved in the idea of *mens rea*. One is that conduct is criminal only if the actor is aware of the facts making it so. For example, it may be criminal under certain circumstances to possess narcotics. The question arises, does the actor know that the substance that he possesses is a narcotic? If he claims that he does not, will he be allowed to introduce evidence to that effect? If he may not, we have what is commonly described as an offense of strict liability, *i.e.*, one dispensing with *mens rea*. The other and rather more difficult notion includes what is sometimes referred to as awareness of wrongdoing. For example, does the possessor of narcotics know there is a legal norm that renders his possession criminal? It is hornbook law that the first of these two notions is usually a limitation on criminality, that the second is not." Packer, *Mens Rea and the Supreme Court*, 1962 Sup. Ct. Rev. 107, 108.

Although petitioner repeatedly asserts otherwise (Br. 9, 18, 20-30), Section 2024(b) does not create a strict liability offense; it imposes liability only on those who are aware of the nature of their acts. Cf. *Dotterweich*, 320 U.S. at 286 (Murphy, J., dissenting). Under the usual approach to the interpretation of criminal statutes, such a state of mind is enough to support conviction. Courts generally have not insisted upon the creation as an additional prerequisite to conviction of a requirement that the defendant realize that the particular transaction in which he engaged was unauthorized: "[i]f the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that the normal intent requirement—*mens rea*—of the criminal law does not require knowledge that an act is illegal, wrong, or blameworthy." *Freed*, 401 U.S. at 612 (Brennan, J., concurring in the judgment). See *Shevlin-Carpenter*, 218 U.S. at 62 & n.1.

2. Petitioner also is incorrect in suggesting that the Seventh Circuit's decision will make criminals of a substantial number of innocent and unsuspecting individuals. In fact, the vast majority of those who come into contact with food stamp coupons—recipients and food stores that participate in the program—have had the Act's requirements explained to them in detail (see page 32, *supra*), and therefore are (or should be) familiar with the ways in which

coupons may be used. Even under petitioner's reading of the statute, all of these persons may be convicted under Section 2024(b) if they engage in unauthorized food stamp transactions.[21]

Petitioner's concerns (Br. 28) about snaring unsuspecting nonparticipants are similarly overstated.[22] There is little doubt that most persons realize that the aim of the food stamp program is "to furnish resources to the poor to enable them to survive," (H.R. Rep. 96-788, *supra*, at 13; see H.R. Rep. 97-106, *supra*, at 52-53), and therefore understand that coupons are not to be traded for private purposes. This understanding may be confirmed by a visit to any food store that posts signs warning against food stamp abuse (see page 32, *supra*), as well as by the stamps themselves: all coupons are marked "nontransferable," and $50 dollar coupon booklets carry the warning that " '[p]ersons using illegally obtained food stamps may be found guilty of a felony.' " J.A. 23 (citation omitted). In this context, individuals such as petitioner, who are offered large quantities of food stamps at a substantial discount, surely can be expected to appreciate the impropriety of the proposed transaction. At the same time, however, the Seventh Circuit's reading of Section 2024(b) makes

[21] Thus, most of the violations committed by retail outlets—pointed to by petitioner as an example of the kind of broad liability that might be created by the Seventh Circuit's ruling (Br. 24)—may be prosecuted under his own reading of the statute.

[22] Petitioner also is incorrect in asserting (Br. 27) that there is little need for the government to aim its enforcement activities at nonparticipants, for anyone may turn a profit by buying and selling discounted coupons. See H.R. Rep. 96-788, *supra*, at 115.

it more difficult for those who engage in such dubious activities to escape conviction by claiming that they were unfamiliar with all of the requirements of the Act and its regulations.

This is not to say, of course, that no circumstances can be imagined in which the application of Section 2024(b) would lead to "an unduly harsh result." *Yermian*, slip op. 11. See *Dotterweich*, 320 U.S. at 284. But this is true of virtually every statute.[23] The Court therefore has recognized that the proper answer to this problem involves reliance on "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries" to forestall improvident or needless prosecutions. *Dotterweich*, 320 U.S. at 285. In contrast, the Court has not taken the course, urged by petitioner, of giving the statutory language an unreasonable reading to avoid the possibility that the statute might be applied in an unreasonable manner. See *Yermian*, slip op. 11.

[23] It certainly is true of Section 2024(b) as read by petitioner. An example of how this is so is provided by the testimony in this case. A food stamp recipient might order a meal in a restaurant such as petitioner's and, while leaving, drop a food stamp coupon on the counter as payment. See J.A. 26. If the proprietor took possession of the coupon, knowing that he had not been authorized to participate in the food stamp program, he would be subject to prosecution—despite the "nonblameworthiness" of his conduct.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK LIPAROTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

A. Neither The Language, Structure Nor Legislative History Unambiguously Support The Government's Reading Of The Statute

The Government has given no convincing reason why the most natural reading of the statute is not that "knowingly" modifies the entire phrase "acquires . . . coupons . . . in any manner not authorized by this chapter." The commonsense teaching of the Model Penal Code should be applied to the reading of criminal statutes, in this case recognizing that the statute contains both "nature of the conduct" and "attendant circumstances" elements, and that the culpability term should be read to apply to both elements "unless a contrary purpose plainly appears." (P.Br. pp. 15-17)

The English language has numerous ways of expressing modifiers, and analysis such as that proposed by the Model Penal Code helps to avoid placing undue meaning on mere forms of expression. Taking Judge Magruder's example (P.Br. 10), if a statute punished those who "knowingly" sell *adulterated milk,"* it would be apparent that the government must prove the defendant knew both that he was selling milk and that the milk was adulterated. If the statute instead were phrased, "knowingly sell *milk which has been adulterated,"* it should have the same meaning, yet it would be subject to the same kind of analysis used by the government in this case. (G.Br. 13) Finally, if the statute were phrased, "knowingly sell *milk in a condition not authorized by statute,"* there is no reason why the meaning should be different.

The government attempts to demonstrate that this case is controlled by *United States* v. *Yermian*, 104 S.Ct. 2936 (1984). (G.Br. 13-14) Quoting that opinion, the government asserts, "Thus, the 'in any manner' element

of the offense 'appears in a phrase separate from the prohibited conduct modified by the term [ ] knowingly . . .' " (G.Br. 13). The government fails to point out, however, that the Court in the quoted language was referring to the current version of 18 U.S.C. 1001, and the fact that the modifying phrase at issue comes at the beginning of the sentence, *before* the word "knowingly." Neither is the government's citation to footnote 6 of *Yermian* persuasive. (G.Br. 13-14). In that footnote, the Court disagreed with the dissent about the reading of the 1934 predecessor to 18 U.S.C. 1001, but in that statute the phrase "in any matter . . ." had been separated from the rest of the sentence by a comma, unlike the situation in this case. This distinction is emphasized in the second sentence after the footnote, where this Court stated, "The statute contains no language suggesting any additional element of intent, such as a requirement that false statements be 'knowingly made in a matter within federal agency jurisdiction' . . ." 104 S.Ct. at 2940.

The government adopts the Seventh Circuit's argument that the placement of the word "knowingly" in the succeeding section, 2024(c), demonstrates that Congress "knew how" to place the word in order to require knowledge of illegality for conviction. (G.Br. 17-18) As the government goes on to indicate, however, the different placement of the word in subsection (c) is due to the fact that the subsection describes a two-tiered offense, that may involve two different actors: Actor one receives, transfers or uses food stamps in a manner in violation of the chapter. Actor two presents the stamps for redemption. Actor two must know that actor one violated the statute. The knowledge required of actor one is not defined because the subsection is not aimed at him. Nothing indicates that Congress was attempting to differentiate the knowledge required of a defendant in the two sections. The most reasonable reading is that the word "knowingly" and "knowing" modify the entire succeeding phrase in both sections, and the "knowing the same to have been received . . . in any manner in violation of . . . this chapter" in subsection (c) means the same as "knowingly . . . acquires . . . coupons . . . in any manner not authorized by this chapter" in subsection (b). In neither subsection did Congress find it necessary to use the word "knowingly" for the limited purpose of preventing the prosecution of persons who did not know they were dealing with food stamps.

Neither has the government demonstrated that the legislative history indicates that Congress addressed itself to the issue raised by this appeal. The government merely quotes summaries of the law's provisions contained in Congressional reports, and then parses the language of the summaries as if they were statutes. (G.Br. 19-20) Certainly by observing in a summary entitled "Penalties for illegal conduct by individuals" that "any unauthorized use . . . may be prosecuted . . .," H.R.Rep. 95-464, 95th Cong. 1st Sess. 376 (1977), Congress cannot be said to be definitively setting forth all the elements of the offense.

B. The Purposes Of The Act Will Be Served By Giving The Statute Its Natural Meaning

The government urges that petitioner's reading would pose an "insuperable burden" (G.Br. 18, fn. 11), forcing the government to prove "a defendant's familiarity with the provisions of the Act and its implementing regulations." (G.Br. 16) It is difficult to understand just what sort of prosecutions are envisioned in making this argument. The kind of prosecutions Congress had in mind, aimed at participants in the Food Stamp Program (P.Br. 27), would not be hampered by a knowledge requirement

because of the extensive notice and civil penalties which are included in the program. To the extent that the government has excess enforcement manpower to devote to nonparticipants in the program, *trafficking* prosecutions should also pose no particular difficulty. The average juror would undoubtedly be impressed with factors such as those the government itself enumerates (G.Br. 34), *i.e.*, that most people realize the purpose of the program, that warnings are posted in food stores and on coupon books, and that the offering of large quantities at a substantial discount implies impropriety. It should be pointed out that even though the trial judge in this case ruled such proof was unnecessary, the prosecutor argued extensively and effectively that petitioner knew that his purchases were not authorized. (Tr. 224-226) She pointed out that petitioner knew from prior experience that he could not redeem food stamps left at his restaurant by customers, that the transactions took place in the back room, that the food stamp books contained warnings, that he had told the agent his brother did not want to have food stamps around, that he had offered to "hustle" stamps for the agent, that common sense should tell anyone that the Food Stamp Program is regulated by the government, and that the stamps were purchased at a discount. In this prosecution, in other words, the government was at no greater disadvantage in convincing the jury of defendant's intent than in any other criminal trial.

C. This Court Should Not Infer That Congress Intended Strict Liability For A Felony Punishable By A Jail Term

It is not true, as implied by the government, that petitioner is arguing for an "ignorance of the law" defense. (G.Br. 32-33) Using Professor Packer's terminology, what is at issue here is his first meaning of *mens rea*, that "conduct is criminal only if the actor is aware of the

facts making it so." (G.Br. 32, fn. 20) In this case, one of the elements of the offense is the "attendant circumstance" that the acquiring of coupons is in a "manner not authorized by this chapter." Petitioner contends that a defendant must be proved to be aware of that fact, a part of the offense defined in the statute. In the words of the drafters of the Model Penal Code, this is an instance where "the circumstances made material by the definition of the offense include a legal element . . . The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense." ALI, Model Penal Code, Tentative Draft No. 4 (1955), Comments, p. 131.

The question presented is: if the Court should hold that the word "knowingly" does not apply to this element, should the Court nonetheless imply that some showing of intent is necessary. Although the government criticizes petitioner's use of the term "strict liability" in discussing this issue (G.Br. 33), petitioner is using the term in the same sense that this Court used it in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978).

The government comes close to arguing that merely identifying an offense as a "public welfare" offense, rather than a "common law" offense, is a sufficient basis for holding that no intent requirement should be implied. (G.Br. 28-29) However, in an instance such as this where the public welfare offense is punishable as a felony, such a holding would fly in the face of the consensus of considered opinion in the years since the issues were raised in *Morissette* v. *United States*, 342 U.S. 246 (1952). See P.Br. 20-23, Model Penal Code, Sec. 2.05(2)(a); *United States* v. *Bailey*, 444 U.S. 394, 404 n.4 (1980); *United States v. United States Gypsum Co.*, *supra*, p. 442; Packer, "Mens Rea and the Supreme Court," 1962 Sup. Ct.Rev. 107, 150-151.

Despite the government's citation of a number of cases where *mens rea* has been dispensed with (G.Br. 30-31), the fact remains that this has been done only in "limited circumstances," and such interpretations are "generally disfavored." *United States* v. *United States Gypsum Co.*, *supra*, pp. 437-438. The rationale of such cases set forth by the government (G.Br. 29) manifestly does not apply to this statute when it is enforced against non-participants in the Food Stamps Program. Certainly Mr. Faltico, a lawyer serving a five-year prison term for violation of the statute, *United States* v. *Faltico*, 687 F.2d 273 (8th Cir. 1982), would find it hard to agree that this is a "statute of prohibition rather than a punishment . . . aimed not so much as penalizing blameworthy conduct as at preventing regulatory injury." (G.Br. 29) Further, as to non-participants, it is difficult to argue for a greater standard of anticipating regulation, or of reasonable care, than those applicable to criminal statutes generally.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for a new trial.

Respectfully submitted,

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